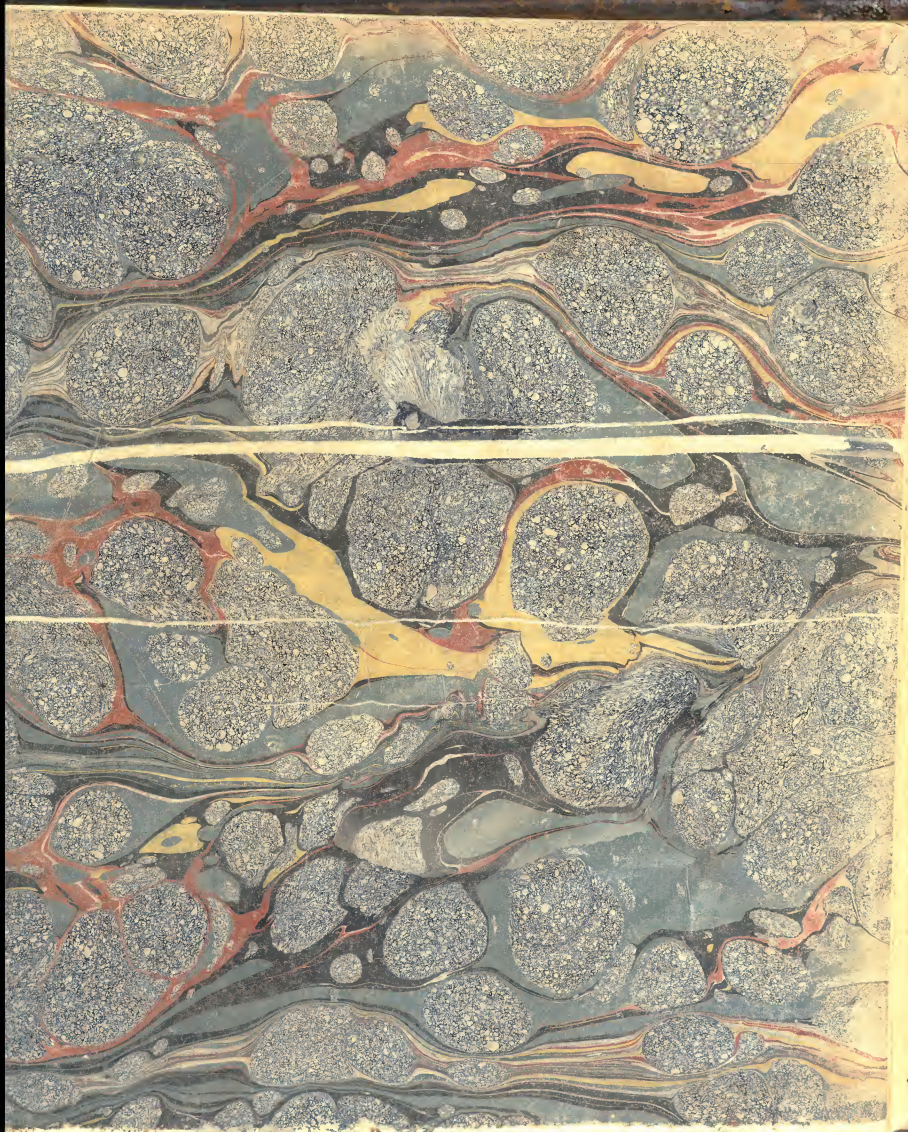

M B Reeve

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A B Reeve

# Alienation by Deed

# Alienation by Deed.

The object of this title is to show how men may purchase and convey according to the legal import of the words.

Previous to entering minutely upon the subject before us it will not be improper to give a slight historical sketch of the origin its origin.

During the dark ages of Europe estates were held by a sort of tenure altogether wholly peculiar to the times & were styled feudes and were subject to no species of alienation — Lands were then granted "at will" by the lord to his vassals as a reward for military services and as proof of their not being subject to alienation they were always held obedient to the will of the Lord and may be strictly called estates at will.

Hence from the strength and antiquity of these feudal principles it is that we are lead to act upon them, when in reality the cause of action has long since ceased to exist — As for instance when A. grants to B. a farm of land without saying any thing more, it is always considered as a grant for life and for life only. This rule received its birth under the Norman system of feudes and previous to this their system estates were held "at well" as has before been observed for a longer period for previous to this time alienation was not dreamt

of as being an operation which estates could possibly undergo.

It will however be observed that after a long succession of years estates became descendable and became so long before they became ~~descendable~~ alienable or devisable. The descent of property was indeed the work of necessity as men became very uneasy in their cramped situation wishing strongly that their lands ~~may~~ might be at the disposal of their families and friends. Step was taken after step till the business of descent became general. For at this time the word heirs was introduced so that estates were given by these words "to him and his heirs".

The practice of aliening first arose from consent being given by the lords to their vassals or tenants to dispose of their lands in this way which consent extended to only one half of their acquired estate but none of their descendable property. But provided the consent also of the heirs be obtained the whole of their acquired estate might be aliened. And the first law which gave power to sell lands was by Stat. H. I. int. this statute gave power to sell but one half

Provided the word "assigns" was used in the

° Which was called the great charter of H. III.

deed by which the purchase was made the whole of the purchased lands might be sold but none of the descenda=ble —

Then also one quarter of the descendable estate could be ~~could~~ sold. And then by Stat. 34. VIII. which was ~~called the Stat. quia emptores~~ one half of the descendable prope=tate was liable to be sold.

Then by stat. of quia emptores 18 Ed. I. which allowed them to sell all their lands except those held by the crown. But by stat. of Edw. III all lands held by the crown might be sold by paying a fine. The next important step taken in this business was in a Stat. of 12 Cha. II. which swept away all fines so that mankind had a complete right to sell all their lands.

About this period lands became liable for the debts of the owner; and this became so known as early as ~~so~~ stat. of West. II. 13 Ed. I which allowed one moiety of the lands to be extended for the discharge of debts. And the whole of the lands were likewise subjected to be pawned in a statute Merchant by the stat. de mercatoribus made the same year, and in a stat. staple by stat. 27. Ed III. c. 9. and in other similar recognizances by stat. 23 H. VIII. And now the whole of the land is not only liable to be pawned for

## Alienation by Deed.

the debts of the owner but likewise to be statutably sold for the benefit of trade and commerce by the several statutes of bankruptcy.

## Who may sell and purchase

We are now to consider alienation on the ground on which it at present stands. And it is first to be ~~mad~~ remarked that there are several classes of characters that are unable to alien either from some natural or legal disability.

All persons who are ~~in possession~~ actually in possession may sell if they are not under some special disability. But provided an alienation is made by him who holds under a disputed title the alienation would not be good even if the title of the alienor should eventually prove to be a just one. And even the alienor would be finable under an express stat. of Hen. 8. The amount of this stat. was that the alienor if punishable should be punished within the compass of one year after the alienation of the land. However there has been exceptions to this rule in a case where A. entered and took adverse possession of lands of which B had a good title; in this case B. aliened the estate

but the time specified by the stat. for the prosecution of such offences was elapsed, still the alienor was prosecuted and fined at Com. law. However provided that the alienation be made to him who has entered and taken adverse possession the alienor will not become subject to the meaning of the stat. Co. Lit 369. Bl. tit. by Ali.

But it is not to be understood that a man may not alien a remainder or a reversion altho' he may not be in possession ~~of it~~ at the time of alienation; as in manifestation it would be absolutely necessary; for instance where A. grants to B. an estate for life keeping the reversion in himself which he wishes to part with in some way as by devise or sale, and unless this privilege is allowed it would often happen that the grantee would die before the grantor, so that it would be impossible for him to command the reversion of his property.

Of persons who have committed treason or felony all of whom forfeit their lands back to the time of the ~~commission of~~ crime being committed tho' no actual forfeiture takes place before conviction so no grant can take place during the intermediate time i.e. from the committing of the act and conviction. Mr Reeve supposes that in the U. States we are not obliged to establish the old Com. law principle

of forfeiture as it is a feudal idea and more fitting fit for those times than for the spirit of the present — In Frize's connection nothing was said of a forfeiture of his lands as that respected no part of the judgment — Had Frize not have been pardoned the question might then have risen respecting a forfeiture of his lands —

Personæ non compos mentis; this class of character which is disenabled from alienating is composed of idiots, lunatics, and those of non sane memory. The mind at once revolts at the idea that a person under any of the foregoing disabilities should be able to convey or that any one should derive a title by such conveyance. The heirs undoubtedly set such conveyance aside but it is a question whether the person conveying can himself set aside the conveyance by pleading his own insanity or if this would be stultifying himself — Still the courts could see no impropriety in letting in the heirs to stultify their father after his death good minum! — In the time of Ed. I. non compos was admitted as a good plea to avoid a man's own bond — But under Ed. III. an idea began to gain ground in the courts that a man could not stultify himself — And during the time of H. VI. the very sage reason was offered and adhered by — that a man

could not tell whether he was insane or not and therefore should not come into court and avoid his conveyance by testifying ~~testifying~~ proving that he was insane —

With respect to conveyances of Infants it is supposed and rightly supposed that they cannot alien — for it is certain that no infant can be bound by his contracts — And if the infant cannot have the full benefit of his privilege by considering the conveyance ~~void~~ voidable let him consider it as void —

This privilege however must be understood as given to the infant to defend himself and not given him as a mean by which he can cheat and defraud.

An other character which is disenabled from aliening is a feme covert — A wife's conveyance even when her husband joins with her may after his death be avoided on the ground of coercion except in the ~~the~~ case of a fine and recovery —

If a feme covert should attempt to make a conveyance by alienation the husband could most assuredly interpose and stop the proceedings; but provided she should actually alien her property and he should not dissent, it would be a good conveyance as against any after interposition of the husband.

# Alienation by Deed.



The wife in a conveyance of her lands cannot make such conveyance so as to take effect at the death of her husband — as there is a ~~maxim no~~ maxim established in the english courts and strictly ~~adheared to~~ adhered to, that no freehold can not be made to commence in futuro but always in presenti.

With respect to a wife's ability to purchase she certainly can. If the conveyance is made good to her she can hold it unless her husband dissents to the purchase but she is not liable to pay a sixpence i.e. she cannot be compelled to ~~fullfil~~ fulfil her portion of the agreement atth'o the alienor may be —

All persons who are under duress imprisonment &c are not ~~have not the privileges of~~ learned by them alienations; And if they are when under these embarrassments caused to make conveyances those conveyances are not in themselves totally void but voidable still it will be noticed that if at any period after this embarrassment of duress is taken off it shall so happen that the person who has made a conveyance under any restraint, may think proper to ~~ass~~ accede to it it will to all intents and purposes be considered as a good and valid contract.

Analien born is still an other character who is dis=

# Alienation by Deed.

=abled from conveying the Com. Law doctrine respecting aliens is this that an alien born whether an alien enemy or an alien friend is unable to purchase estates for his own use whether estates in fee simple in fee tail or freehold estates he has not the liberty of taking leases of lands and as he is deprived of these ~~liberty~~ liberties he is of course unable to convey.

It is observed that an alien is disenabled from taking a lease of a house, this is not strictly true or an alien friend is always allowed the liberty of taking ~~a house~~ a lease of a house and gardens for the purpose of better carrying on of business — But when he purchases land for his own use he is in constant danger of being deprived of it by the arm of the law —

But provided an alien does purchase lands and it so happens that ~~he so happens that~~ he lives unnoticed and dies in the peaceable possession of them his children provided that he had any will inherit, or they are citizens.

In Eng. till of late years paperts were considered as unable to convey —

## What is the definiton and what are the peculiar qualities of a deed —

Co. Lit. 171.

# Alienation by Deed.

Originally lands could be conveyed by making livery of Seisin, without any written instrument. But since the stat. of frauds and perjuries, no interest in lands can be conveyed, unless by an instrument in writing.

A Deed is a writing sealed and delivered by the parties. Agreements therefore conveying an interest in lands, unless sealed cannot be denominated deeds. Such are executory agreements to convey, which can be enforced only in Chancery and need not be sealed.

Incorporial hereditaments were always conveyed by deed.

Sealing which the Eng. law has rendered so important does not in truth add anything to the solemnity of the instrument. In Ancient times when writing was generally unknown, it was probably the best evidence procurable of the assent of the parties "Sed tempora mutantur"

In Con. it is universally the practice to seal deeds, tho' there exists no stat. rendering sealing necessary.

When a fraudulent deed is executed, with an intention to defraud creditors, the deed as between the parties immediate parties is good. Here no respect is had to any right of the grantor whom the law supposes to have forfeited it by his fraudulent conveyance and the grantee is said to hold in trust for the grantor tho' fraudulently and illegally.

Vide 2 Co.
Dwynes case

Cowp. 434.
1 Bl. R. 2.5
2 Bl. 300

Of course creditors may levy upon the land or the property of the grantor.

If with the same object in view (defrauding defraud=ing creditors) a partial consideration be paid by the grantee, it is still a fraudulent conveyance as to creditors and the land con=veyed is not liable even for the partial consideration paid by the grantee.

And even where there has been a full consideration paid, the conveyance may be fraudulent and void as to creditors. This can happen only when a man possessed of real estate, and owing debts equal to the value of the estate, sells it for the full con=sideration to a grantee for the express purpose of screening him=self from his creditors by turning the property into money and evading their demands, and provided their intention was known to the grantee at the time.

The stat. against fraudulent conveyances 13 Eliz. is generally adopted in its provisions by the states and is made in affirmance of the com. law.

It has been observed that the grantor or between himself and his fraudulent grantee, loses his title by the fra=dulent conveyance.

But tho' the grantor ~~can never~~ cannot recover the land, still may he not recover its value from

the fraudulent grantee? This is quæstio vexata. If the whole design of the law is to bear hard upon the grantor, he certainly cannot recover the value. But if the law proceeds upon the principle, that the grantor shall be estoped by his own deed, from questioning the validity of the conveyance, and that the bargain is a binding one, between the parties, it would seem that the grantee ought to give a quid pro quo and that the value may be recovered from the grantee.

By the late decision of the superior court in Litchfield county ~~court~~ in the case of Brace vs Cattin it seems to be the opinion of the court that the value of the lands cannot be recovered by an action brought by the grantor against his fraudulent grantee. Still however it is "quæstio indeterminata".

A difficulty has arisen in construing the stat. The stat. provides that the conveyance shall be void as against the creditors of the grantor intended to be defrauded. This it was argued could not include subsequent creditors, for they could not have been contemplated at the time of making the conveyance.

But on the other hand it is said that the property of the fraudulent grantor ~~ought~~ ought to be liable to all his creditors, and that the argument used on the opposite, proves too much; for suppose the fraudulent ~~intended~~

grantor intended to defraud ~~and~~ only some of the prior creditors, could not the rest come in? undoubtedly they could, and it is now settled that fraudulent conveyances are void as against all creditors, prior and subsequent; but merely voluntary conveyances made without any fraudulent intention is void only as against prior creditors. This is a leading distinction.

The stat. further provides that the conveyance is utterly void as to every ~~purchase~~ person except the party conveying, his heirs Exors and assigns. Now if the Exor can claim at all, it must be as trustee for the creditors; as representative of his testator the fraudulent grantor, he could not, but in Con. it has been decided that the Exor of the grantor may claim the land as trustee for the creditors of his testator.

There is a very celebrated question concerning which the luminaries of the law have "agreed to differ" says Mr Reeve. Suppose a bona fide purchaser buys of the fraudulent grantee, who shall bear the loss — such honest purchaser or the creditors ~~or the creditors~~ who are no less honest? In equity the scales are equally balanced between the parties. It is Mr Reeve's opinion that the conveyance is bad in the hands of the bona fide purchaser. On the other side it is demanded, could not the grantor himself have conveyed the land to a bona fide purchaser, and would not such conveyance be good?

And if so why could not the fraudulent grantee convey to the bona fide purchaser? for merely there can no harm arise in the fraudulent grantee's ~~doing~~ doing what the grantor could do - What difference could it make to the creditors? - The fallacy of this plausible argument says Mr Reeve lies in this - the law is made to protect creditors; to give them every possible advantage, and not merely to prevent conveyances without a ~~reff~~ reference to that object; Now where the debtor (that is the grantor) conveys to a bona fide purchaser (i.e. the grantee), he receives a quid pro quo and is as able to pay his debts as he was before the sale - But this is not the case when the conveyance is from the fraudulent grantee to the bona fide purchaser for here the property of the debtor (i.e. the grantor in the above case) is in no wise benefited by the sale - because what a door to collusion and fraud does the opposite construction set open - How easily could the fraudulent grantor and grantee combine, first to make the fraudulent conveyance and then the bona fide sale, and thus exclusively for the purpose defrauding the creditors - To this it is objected that the ~~g~~ fraudulent grantee is liable to the creditors - what then! - Ought ~~ought~~ the creditors to be obliged to resort to him who may be a bankrupt - -

Again "Prior in tempore potior est in jure" the creditor was prior in time to the bona fide purchaser and in a

analogy to the rule adopted in cases of theft, ought to be performed.

The following question was put from the bench to Jn Than=bottle Grimstone "Whether a conveyance may ~~be made~~ not be made to defraud creditors in any case whatever, which will be valid" The meaning of the question seems to be this: Can property be so conveyed as to secure it from the demands of creditors? When other sufficient real estate is left to answer their de=mands? This it will be perceived, has not the effect to deprive creditors of their security but merely of their execu=tion on what part of the property of the debtor their execution so it does not contravene the spirit and intention of the law, & can hardly be termed a fraudulent conveyance if made reasonably therefor says Mr Reeve it will be allowed.

An other question - May not mere voluntary con=veyances be made under such circumstances, that even the pri==or creditors will not be permitted to take the property from the voluntary grantee? Mr. Reeve answers this question in the affirmative; and puts a very striking case which happened during his own practice - Mrs Sanford was the wife of a young gentleman of large fortune, exceedingly dissipated but subject to occasional fits of repentance - In one of these intervals of compunction finding his estate rapidly wasting he made a conveyance to his wife of a small estate amount=

=ing to about £800 after a lapse of ten or twelve years his whole fortune was expended — the inquiry saw the rapid dimi=nution of Sanford's property, but took no means to secure their demands; and afterwards were precluded from com=ming upon the estate — upon the ground of their neg=ligence —

If however a man in debt voluntarily con=vey to his children, the inference is that it is fraud=ulent —

This distinction of voluntary conveyances is not grounded on stat. nor upon any other maxim of the com=mon law ~~than~~ than this "What a man must be just be=fore he is generous — Comp. 437, 705. Talb. 64. 3 Wilr. 356 —

# Deeds –

## Covenants in Deeds –

There there are different kinds as first a covenant of the Grantor that he is seized of the premises conveyed And secondly that he will warrant and defend &c –

A quit claim deed may contain neither of the covenants but warranty deeds generally contain both –

If a grantee is fearful as to the goodness of his title if he knows or suspects that the real title is in ~~the~~ some one else he ~~may~~ may sue the grantor on the first mentioned ~~warran~~ ~~ty~~ covenant at any time either before ~~of~~ or after he has been disturbed in the possession or after he has been ejected – and if in such suit he can prove the grantor's title not to be good or that the real title is in some one else he may prevail in his action –

But the covenant of warranty cannot be sued upon until the grantee has been actually ejected –

If the covenant of warranty be against "all claims" the grantee can recover not the expence he may have been at in defending the title against illegal or ineffectual claims but only his damages in defending the title against legal & effectual claims: for the terms "all claims" or "all claims whatsoever" mean only all legal or effectual claims –

But if he be warranted in the ~~grante~~ quiet enjoyment of the estate against "all legal and tortious claims" the grantee may recover in an action of covenant broken all the damages and expence he has suffered in defending against such claims.

When the grantee is sued and his estate is chalanged it is the safer way for him to notice or vouch in his warantor to defend the title. Because if he so vouch him in (whether he actually appear in court for that purpose or not) and he gets beat the warantor is as between himself and the grantee always estoped afterwards from proving his title, but in an action of covenant broken the grantee must recover. But on the contrary if the grantee do not vouch in the grantor but himself make as good a defence as he can, still the grantor in an action ~~of covenant broken~~ upon the covenant may prove his own title to have been good and thus get clear of all damages from covenant.

Any notice which can be proved that the grantor had of the suit against the grantee is a sufficient voucher but it is better to issue a writ called a voucher against him.

There has arisen in this country a great question, whether in case the title fail the grantee of a quit claim deed cannot recover back from the grantor the

B.

Nor is this contrarient to the rule that no disputed title shall be sold — For unless a man is or has been actually ousted he may sell his title —

# Deeds –

consideration money –

It is a little extraordinary that the Eng. books furnish us with ~~no~~ no decisions to this point – the cause of it prob=ably ~~did~~ is that quit claims are seldom given in Europe ex=cept under peculiar circumstances – and then it is a con=tract of hazard; For in these cases the situation of the title is perfectly well known and all the claims and demands a=gainst it are known to exist by the grantee when he buys. ×

But in this country the case is very different, such deeds are very common particularly when land at a distance is bought and sold – and whenever the grantor is not per=fectly acquainted with the title, tho' he knows of no ad=verse claim it is common here to give a quit claim –

Hence when a man buys a title which he knows not much about and gives a valuable consideration for it, it is reasonable that if some unheard of claim should be made to it and he ejected the consideration money should be returned and so in an action of Indeb. Assumt. it can be recovered –

The law as ~~this respects~~ it respects these kind of covenants Viz. that in deeds differs from other kinds of contracts because in common cases the Exr. and not the heir can sue for a breach after the covenantee's death

b 2 Vent. 92.
1 Roll. 520.

c 1 Vent. 176.
244. 2 Leo.
26

and this leads us to consider ~~who may be sued~~

## Who may sue

If the covenant be a covenant of inheritance the heir of the covenantee shall take advantage of the breach of it.

But herein the distinction is to be taken Viz. if the breach be made during the life of the covenantee the Exrs, only as in common cases shall take advantage of it - and the right of action will in every such ~~action~~ case go to the Exrs - But if the breach be made subsequent to the death of the covenantee and the covenant be an inheritable one, or one which runs with the land the heir only shall sue and their tho' the heir is not mentioned. e

In this then it differs materially from covenants respecting personalty

If in common cases the "Executors" are not mentioned in the covenant but only the heirs still the right of action will descend to the Exrs, only and not to the heir -

So in cases where the covenant runs with the land and the heirs are not named yet if the breach is made during the covenantee's ~~death~~ life, the Exrs shall notwithstanding sue for the breach - e

The heir of the covenantee can never sue for the a breach of the covenant of seisin - Nor is their inconsistent

with the fore going rules, because if ever a covenant of seisen is broken it is broken in the covenantee's life: Viz. on executing the covenant Because the covenant is that the grantor was at the time of the execution of the deed seised - and if he in fact was not at that time seised the covenant is eo instanti broken -

Agreeably to the foregoing rules if A grants lands to B. for twenty years and in the indentures B. covenants to pay a certain sum annual rent and A. the lessor die before the ex=piration of the term and after his death B. neglects to pay rent thereby breaking his covenant A's. heir only shall sue: but if the breach had been made before the death of A. the executor only could have sued: and if the breach were made both before and after, the heir shall recover for all ~~all~~ damages accruing from the the breach after and the Exr. for all damages accru=ing previous to A's death -

So if A. covenant with B. that B. shall have a right of way over a certain part of his farm, or that he A. will not stop up a water course running thro' his land on to B's land, this is a covenant running with the land, and if after the covenantee's death it be stoped up, the heir not the Exr. may sue the covenantor or his heir provided A. covenanted with B. and his heirs &c -

And if the covenantee assign his farm attach=

1 Roll. ab. 501.
Sta. 17. Co. Lit.
388.--

1 Lev. 99.
2 Lev. 226. 1
Salk. 317.

1 Saund. 371.--

## Deeds –

=ed to which is this covenant, the assignee tho' not named in the original covenant and tho' there be no ~~privacity~~ privity of contract between him and the covenantor, yet may sue him in covenant and recover the same damages which his assignor might have recovered –

And the same is the case with respect to assignee's of leases where for instance where the ~~comm~~ lessee covenants to repair the house the assignee or his assignee or the executor of his assignee may sue the covenantor for damages in not repairing or may be sued by the heir of the lessor for not performing his cove= =nant viz. in not paying rent &c – and it will make no odds in this case whether the word assigns is mentioned or not in the covenant –

## Who may be sued –

A. In the case of the death of the covenantor if the co= =venant be relative to a chase (as if the covenantor be a lessee) and there is a breach of the covenant the Ex^tor should ~~be~~ reg= =ularly be sued because the heir has nothing to do with the chase which is personal property –

But not so if the covenant be touching real property: as if a man covenant that B. shall for ever

enjoy the benefit of a certain water course which A. had a right to turn or stop, in this case if A. dies and B. is deprived of ~~it~~ the benefit resulting from the water course he must sue the heir of A. and not his Exr., because the covenant is rather attached to the land than on a personal engagement only — however in most cases either the heir or Exr. may be sued as where A. sells land and enters into a covenant of warranty ~~the~~ he dies the estate is then challenged by an other claimant ~~heir~~ and it is proved that the covenantor had no title — in this case ~~in this case~~ the Exr. who has the appropriations of personal property may ~~sue~~ be sued and as the covenant is by a sealed instrument so may be the heir —

(In Lou. however it is very problematical whether in any case the heir or heir can be sued: because the Exr. is ~~virtute officii~~ by virtue of his office bound to satisfy all demands against the estate and for that purpose the whole property real as well as personal is put into ~~the hands~~ his hands — However the case might happen in this species of covenant that the breach be not made till after the settlement of the estate by the Exr. and he has procured a quietus — In such a situation it is probable that the heir (Viz. all those persons to whom the estate is distributed) may be sued —

And if the covenantor devise his estate it is

(a)

As for example A sells land to B. with a warranty & devises other lands to C. and dies; now provided that an other claimant appears claiming as his, the land which A. had sold to B. and substan=
=tiates his claim and proves A. to have had no title to the land which he sold to B. — B. in this case can come upon C. the devisee of A. and take the lands in his hands; but provided C. the devisee has aliened the land previously B. will with be without any resource —

it is still liable in the hands of the devisee; but if the devisee alien it and no other property can be got at the covenantee is without redresse — (c)

## Of assignees of covenantees and where bound —

From former remarks it would follow that an assignee of a lessee will be bound by the covenants of his assignor. But this rule must not be taken as universal —

There are cases where an assignee would be bound whether named or not, in the indentures of the lease — There are cases where he would not be bound if he were mentioned. And there are cases where he would be bound or not bound as he is mentioned or not — And here is to be taken a distinction between covenants not affecting the demised premises; Covenants which may affect them but which do not run with them; And covenants which run with the land

A covenant not affecting the demise or a collateral covenant is one to build a barn perhaps or a stone wall on lands other than those demised —

A covenant respecting the demise but not running with the land is where a lessee for years covenants at a given time to build a barn a house or a stone wall ~~all and be~~ — on the demised premises —

Co.
Com.
Co lit.
Vin. ab. Ve.

# Deeds.

And a covenant affecting the demise and running with the land — is where a lessee engages by covenant to pay a certain rent, to keep the farm &c in repair &c —

## When the assignee is not bound tho' named.

If the thing warranted to be done does not relate to the demised premises, but is collateral to it the assignee whether named or not is not bound —

As if the thing covenanted to be done be to build a barn on other lands than the demised premises In no such case as this, will the assignee tho' mentioned in the indenture ~~of the lease~~ be obliged to perform the co=venant of his assignor —

## Where the assignee is bound if mentioned and not bound if not mentioned.

If the lessee should covenant about a thing not having existence at the time of entering into the cove=nant but concerning the demised premises his assign=ee is not bound by the covenant unless he be named in the indenture — As if the lessee for years covenant with=in six years to build a barn or stone wall upon the premises. In such case if he be named or mention=

5 Co. 516.....

5 Co. 16. 24.
Cro. Eliz. 487.
552

ed in the lease he shall be compelled to ~~pullf~~ fulfil it, the covenant for the building of a barn or stone wall concerns the demised premises and the annual rent no doubt is proportionably less as the thing to be done increases the value of the farm.

But if the covenant was broken before the assignment to the assignee the lessor can have ~~recourse~~ recourse only to the lessee, whom he can always compel to perform the covenant whether the assignee is likewise liable or not.

## When the assignee is bound at all events.

If the lessee covenant respecting a thing which had existence at the time of the lease and which respects the demise the assignee is compellable to execute the covenant of his assignor, tho' there is no privity of contract between him and the lessor and this tho' he is not mentioned in the indenture i.e. if the lessee do not covenant for himself and his assigns.

That is a covenant which is said to run with the land which has existence at the time of the covenant and in every such case the assignee is bound, named or not named. As if A. lease to B. for 40. years a house and farm and in the indenture B. covenants to keep the house

fences be in repair and then assigns the lease: and tho' the as=signement does not exonerate B. from his covenant yet it renders his assignee liable if called upon. So if B. had cove=nanted to ~~pa~~ pay a ~~a~~ certain yearly sum as rent this is likewise a covenant which runs with the land; for it had existence at the creation of the estate and relates to it.

But if the covenant be to pay a certain specifi=ed sum in gross it is a personal contract and does not relate to the land but the land ~~but the land~~ is con=sidered as absolutely sold for a certain time —

But a reservation of an an annual rent is not of that nature: such a lease is not considered as an ab=solute sale, but as a continual enjoyment of the lessor of the land the rent is considered as a thing issuing out of the land and on the death of the lessor shall go to the heir when on the contrary land is sold ~~for~~ a term ~~for years~~ of years, in consideration of a certain sum in gross, that sum tho' not become due till after the lessor's death shall go to the Ex^tor for a certain proportion of his es=tate is turned into personalty —

## Implied covenants in Deeds.

The words "give" "grant" and "sell" dedi et con=

4 Co. 806. 5 Co.
17 Carth. 98.
Palm 38 b.
2 Mod. 92.
Esp. 267

Co. Lit. 384.
5 Co. 16. 24.
Cro. Eliz. 678.
4 Co. 806.
Yelv. 175

=cessi or demisii are said to imply in deed a covenant that the grantor well seised of the premises was well seised of the premises — And on this implied warranty the grantee or his Exts. may at any time sue —

But those words likewise imply a general war=ranty of quiet enjoyment &c which lasts only during the grantor's life — But these covenants in law are always restrainable by express covenant or covenant in deed —

## Exceptions in Deeds —

A conveyance of lands will regularly convey every thing which is attached to them — The word land is a techni=cal expression of which will of itself convey tenements and hereditaments —

Hence it becomes necessary if any right is work=ed to be restored reserved by the grantor (as a field of grain &c) he must make an express reservation in the deed —

If this reservation is not expressly made in the deed or in some sealed instrument, all things on the land which are considered as attached to it notwithstanding any parol a==greement, will absolutely pass, as even rent — in arrear and even Cha. can give no relief in such case —

But where a thing is properly reserved, the

Co. Litt. 47
4 Mod. 11.

2 Roll. 454.
Hob. 170. 106.
106

Co. Litt. 47.

Co. Litt. G. & Co.
5. Gelv. 193.

the law reserves every thing which is necessary to the full enjoy=
=ment of it – as if a crop be reserved by implication of law
the right of ingress egress and regress is also reserved –

The exception in a deed and the deed itself may be in=
=compatible i.e. the grant and the exception may be incompat=
=ible as where the whole which is given is excepted. In such cas
~~at~~ agreeably to this rule that every deed shall be taken most
strongly against the grantor the grant will be good and the
exception wholly void – For as the exception is wholly repug=
=nant to the grant it could not be made to stand as to a part
because it could not be determined which part to prefer –
As when a man conveyed to one all his lands in A. which did
not come to him by descent and it so happen that they all come
by descent the exception being repugnant is void –

Again an exception may be void for its uncertain=
=ty as if A. grants to B. his farm containing twenty acres
except one acre the exception in this case being uncertain is void.
And yet there appears to be no good reason why the grantor
should not remain tenant in common with the grantee –

The date of a deed is its time of delivery and this may
be inferred merely from the derivation of the word – What in
common parlance is called the date is only presumptive ev=
=idence of the date or delivery which presumption may be re=

# Deeds –

=butted by parol. 1

Nor indeed is any memorandum of the time &c of the date at all to be on the instrument, for it is a matter in pais and may be proved by parol or otherwise –

Hence if the instrument be dated wrongfully or have an impossible date the true time of delivery may be proved for the date or the delivery does not intrinsically effect the written instrument –

# Methods of Conveyance –

Where remains to be considered the different kinds of conveyances many of which being entirely out of use, require little else than to be named –

1st The only method formerly in use to convey a fee simple and the conveyance was or sale was effected effectuated by livery of seisin and the delivery of the twig and turf

2nd The second kind of conveyance was that called a gift – This was the exclusive method of conveying entailments and differed in nothing else from a feoffment –

3rd Grants were applied to effectuate a conveyance of an incorporial hereditament only –

4th A lease was a conveyance of land or rather the

2 Blac. 828.

right to use it for a certain number of years or for life leaving a reversion or remainder in the lessor or other person —

5th Exchange this was merely changing one deed for an other —

6th A deed of partition is that by which tenants in coparcenary — jointenancy and in common divide their estate and turn them into severalties — The method is for each to convey absolutely to the other —

These are the several species of conveyance which are called original or primary — Those called derivative are yet to be treated of —

1st A lease and release was invented to avoid the trouble of an actual livery of seisin — The method is to execute a lease perhaps of one year to the grantee: and the grantee being constructively or implicitly in possession may then take a release of the reversionary right from the grantor

2d Conformations and assignments are not now in much use —

## 3d Uses and Trusts —

In order to understand well, the third method of conveyance viz. bargain and sale and in order to acquire this useful knowledge we must be made acquainted

with the doctrine of Uses and Trusts -

The doctrine of uses of uses is now at an end under the Eng. law tho' much the same doctrine is revived under the name of trusts -

Early in the annals of Eng. History much alarm was excited by the rapid accumulation of real property in the hands of the ecclesiastical houses. To put a stop to this the statutes of mortmain was passed - These statt. however could not withstand the ingenuity of the ecclesiastics of the day - As by those stats, ecclesiastics as such could not own the legal title to any estate they contrived that conveyances should be executed to some indifferent person - but for the use of such ecclesiastical houses and as the courts of Cha. were filled with ecclesiastics and were supposed to have power in such cases - those persons who held to the use of an other or others were compelled to execute that use - But the evil was too great not to be remedied - Wrought upon by the superstition of the day people on their death beads and otherwise would make numerous grants to the clergy under the impression that it was good for their souls - And in this way there was a threatning prospect that all the real property in the Kingdom would be swallowed up by the religious houses - The legal estate in lands could not at that time

be devised: but by the construction given to the invention, it was held that the use of land could be devised and having this advantage and some others about the time of Edw. 6. it became the most general mode of conveyance —

The grantee is called the ~~feoff~~ feoffee to uses and the person to whom the use is given the cestuy que use ~~use~~.

The incidents of this curious kind of estate were 1st that if the cestui que use committed treason or felo de felony the use was not subject to the forfeiture, the legal estate only being liable to forfeiture and was then held by the King discharged of the use — This was considered so ~~so~~ far as real property ~~however~~ that like an incorporeal hereditament ~~that~~ it was descendable; but different from others it was likewise devisable — it was not liable to dower or to the curtesy nor was it subject to be taken for debts or subject to any of the feodal burdens —

Some inconveniences attended this estate however which were very great — Viz. the bone fide grantee of the feoffee to uses would hold discharged of the use and at first it was held subject to many other incumbrances which the feoffee to uses was able to put upon it — But after a little time the legal estate became no longer subject to dower or curtesy or indeed ~~to~~ anywise effected by any act of the

## Deeds –

feoffee – except by alienation to a bone fide purchaser without notice – So that it became a thing entirely without the reach of forfeiture or debts or dower or any thing else – But this privilege was found productive of bad consequences and by stat. of H. 5. & 6 Rich. 3. the estate of the cestui que use was made liable to forfeiture to debts &c –

These statutes made a very considerable alteration in the nature of the estate – they enabled the cestui que use to make leases which he could not do before

Decision after decision at length very much assimilated this estate to real property at length the stat. of the 27 H 8 declared that the legal estate should be considered as following the use – Thus ecclesiastical ingenuity was at length frustrated for the conveyance of a use being likewise a conveyance of the legal estate the statute of mortmain again operated and the practice of conveying to ecclesiastics was crushed –

## Trusts –

But why at the present day do we hear so much of use estates! It would certainly from a view of this subject thus far, appear that the doctrine of uses was entirely annihilated –

But the fact is that this stat. of uses had

r Dyer. 158.

s Dyer. 369.

no other effect than to give rise to some modes of conveyance & the doctrine of uses was again revived with very little variation under the denomination of trusts —

A rigid adherence to a few technical niceties then frustrated this statute —

The Judges held in the first place that no use could be limited on a use and that when a man bargains & sells his land for money which implication to the bargainee the limitation of a further use to an other person is repugnant and void — And therefore on a feoffment to A. and his heirs to the use of B. and his heirs in trust to C. & his heirs they held that the stat. executed only the first use and that the second was a nullity: not adverting that the instant the first use was executed in B. he became seised to the use of C. which second use the stat. might as well be permitted to execute as it did the first: and so the legal estate might be instantaneously transmitted down thro' a hundred uses upon uses till finally executed in the last certain one use —

Another scruple which the judges thought too weighty to get over was that as the stat. mentioned only those who were seised to the use of an other & the stat. could not be made to extend to those who were only

possessed to the use of an other: & therefore that estates for 100. or 1000 years might be created and devised to A for the use of C. and the use was still disconnected with the legal estate — &

And lastly (by very modern resolutions) where lands are given to one and his heirs in trust to receive and pay ~~more~~ over the profits to an other, this use or trust is not executed by the stat: for the land must remain in the trustee to enable him to perform the trust —

Of the two more ancient distinctions the courts of equity quietly availed themselves: and having wisely avoided in a great measure those mischiefs which made uses intolerable have by a long series of uniform determinations for about a century past, with some assistance from the legislature, raised a new and an extremely beneficial system of national jurisprudence ——

## Qualities of a Trust estate —

A trust estate like other real estates must be created by writing and with the same solemnities as other real estates and like them it is descendible — alien-

=able and devisable liable to debts (being considered as equitable assets) liable to forfeiture for treason but not to escheat for felony —

The cestui que use (or trust) may change it by mortgage &c, it is subject to curtesy and if it were subject to dower its symetry would be compleete — but in Eng it is not —

The trustee in is considered as a mere instrument of conveyance and can effect the trust in no other way than by alienation for valuable consideration to a bona fide purchaser without notice, which as the cestui que use is generally in possession can rarely happen — And Mr. Reve thinks that if the trust were negutatived & given in the same deed of conveyance as the legal estate it would amount to notice whether the purchaser actually saw it or not —

The third method of conveyance which took its origin from this system of uses and trusts and which has now become one of the common assurances in Eng — and much used in America is by deed of bargain and sale —

And this when for a valuable consideration A. contracts and covenants with B. — now A. having received his money from B. is to all intents seized to B.'s use and

the stat. of uses immediately transfers and annexes the use to the legal estate and the bargainee becomes constructive seised of the legal and beneficial estate —

But in order to prevent the inconveniences of the secret estates it was provided by stat. that all such bargains and sales should be recorded — But to be at that trouble and expence being considered as being below the ~~ow~~ of our ~~study~~ sturdy ancestors they devised a method without livery of seisin to get rid of it which was effected by the method before spoken of viz. by deed of Lease & Release —

And by the same doctrine of uses the lessee may acquire the freehold. For when A. leases to B. for one year he becomes seised of the freehold to B's use for one year — But a constructive possession follows the use therefore being constructively in possession the lessee may take a release of all the lessor's interest —

# Trespass.

Injuries consequential are remedied by an action on the case.

II. Trespass, it has been observed is remedied by an action of Trespass – Trespass may be defined to be, the entering into another's or other man's land without his consent, and doing some damage – Here the word lands includes whether houses trees &c and every thing annexed to the freehold – The right of Mesne and Tenure is so strictly guarded that no damage can be done however small without subjecting the agent to this action –

There are many cases however where the entering on lands is permitted by the law; as to execute a legal process, tore if waste be committed &c &c.

This action rests upon the possession of the Pltf. for in Eng. a man's land may be very injuriously invaded, with impunity as it relates to this action, for Ejectment is the action when there is no possession, by which action, possession may be recovered –

In Eng. the law contemplates an actual possession (viz. a pedal possession by entry) the Lou. law contemplates only the right of possession to sustain this action – As in Eng where the ancestor dies, the heir cannot maintain their action for an injury done before he obtains possession – It is otherwise in Lou. this constitutes probably the only difference between the Eng & Lou. law –

Lieffects by Jewards recommended - the objection that
one convicted does for indemnity - should appear
fellow convicted does for indemnity - should appear
to be an indictment and effectual - the witness should
must judge as the general course of proof - a felony is
voluntary & effects considered - the law of evidence
in criminal cases ~~when accomplices~~ the principle of
protection - when should grant immunity &
when not recal - as man should be imposed upon
which may deny of his knowing or leading down
the subject considered Jewards Grounds for
refusing from analogy in the case of
Tamering Trust - of criminal charges if
by the practice of criminal by law 5 Co 16 b Gresley
& Wilson 20th breaking of lessees profession
obtained by fraud prosecuted criminal

Indictment & Bloom 30 & 10th & 46
mal & Lewis 20 Mich 5 & 6

2 Roll 553.
Co. 2. 257.

# Trespass.

If the reversioner trespasses, the lessee or tenant in possession may bring this action against him.

Tenant at will or sufferance may bring this action against strangers who are trespassers, but not against the owner because the entry of the owner is a determination of the estate. But it may be brought even against the owner in this case, if he invades the emblements, for to these the tenant has a right by possession.

A mere trespasser or intending possessor, having no licence either express or implied is the only possessor who may not sue.

It is to be remarked that if a lessee at will does any act which constitutes waste he is a trespasser.

In case of Disseisin - the Disseizee is the real owner, the Disseizor the possessor. The Disseizee may bring an action of Lawfulness against the Disseisor for the disseisin itself. But before any other action of Lawfulness can be brought, that of ejectment must be brought to recover the possession.

The law however permits an action for the mesne profits; but to support this action of Trespass; the law supposes the disseisee to have been constantly in possession. The action of ejectment suspends all others, by giving both possession and damages.

2 Roll 554.

1120. 51.

Pow. M. 92.

2 Roll 569.

# Trespass.

There has been a great question on which even elementary writers differ. Where a stranger enters into timber, and does mischief, the disseisor being in possession, can the real owner bring an action against him, or does it belong to the disseisor being in possession. Can the real owner bring an action against him or does it belong to the disseisor in possession ~~only~~ solely? Now there seems to be no doubt but that the disseisor might have an action and if this be the case it would follow that to give the real owner an action, would be subjecting the trespasser to two actions which contradicts a known principle of law. The argument of Power all who ~~quote Coke~~ quote Coke (which authority seems to support him) is that the disseisor should bring the action because the disseisee may bring an action against him.

If the person trespassed upon, disposes of the premises he does not therewith sell the right of action. He has a right to sue if he was possessed of the land at the time of the trespass committed.

It is settled that all persons who enter upon land by the command of an other shall be ~~sued~~ may be sued. But if these servants are damnified by actions commenced against them, in this manner they are not considered as joint wrong doers, and therefore they have their remedies against their master. The reason upon which this is founded, is that

2 Roll 552.

# Trespass.

in such cases the master claims, and it does not belong to the servant to investigate the legality or justness of his claim or title. But it seems where the servant knows of the wrong of his master it will be otherwise.

Trespass, lies against any person who aids, procures, commands, or advises, the commission of a Trespass.

Trespass lies not only against masters servants &c &c but for trespass committed by a man's cattle getting into an others land and doing damage.

When there is a dividing fence one half belongs to one proprietor and consequently must be kept in repair by him, and the other half to the other proprietor. If a breach is made over the part which is lawful, the proprietor of that part will have his action. Not so, if unlawful or rather not lawful.

If a part is lawful and a part not so belonging to the same man and a breach over the lawful part, it will give him his action. By "cattle" in this place is meant Hogs, horses, sheep, goats, neat cattle, &c &c.

Commonable cattle are sheep and neat cattle and these are protected unless the fence is lawful. But neither Horses, hogs, nor goats, are commonable, and therefore if they break over a fence not lawful, their owners are subjected.

Where bye laws make those beasts commonable which

2 Roll 561.
3 Wms. 20.
8 Co. 146.
6 Carpenter's case

# Trespass.

were not so anterior to the enaction of the bye law, yet damages may be recovered for their trespasses the bye-law notwithstanding, and the only benefit of such bye law is to free them from being impounded.

This injury must be immediate and not consequential. 8 Ira. 634.

It is said that where a man breaks open a house in the night time & trespasses cannot be brought for the damage because it is merged in the felony this is reasonable when forfeitures prevail; but in Com where they do not prevail, this action is laid to remunerate the party trespassed upon. 2 Roll 549.

There are cases in which the law gives a man a right to enter his neighbours land, after thus lawfully entering if he commit an unlawful or wrong act the law makes him a Trespasser by relation "ab initio" As where a man enters a tavern which he has a right to do but after entering commits some act of violence, it will make him a Trespasser ab initio. But for an act of non feasance it will not be so.

So where a man enters another's land in pursuit of a beast damage feasant, and afterwards kills the creature this trespass will abnetate back.

There are some cases in which it is lawful to enter a mans house and some in which it is not. 24 Gra. in case

# Trespass.

he has process &c.

The law is, that where the doors are open he may always enter, but he ~~cannot~~ can never break an outward lock unless in ~~circumstances~~ criminal cases. If however he gets into the house by an outer door peaceably, he may then break an inner door. Doors may be broken open in all criminal cases.

It has been said that an outward door cannot be broken in civil cases. but to this there is one exception and that is where a man has had judgment rendered against him and has been actually taken under an execution, the officer may break outward doors to retake him. A man's house is his own castle ~~as~~ (i.e. his own as well as those who reside with him and are of his family) & therefore ~~to~~ no protection to others.

One reason for the general rule that outer doors cannot be broken open applies ~~as~~ to large towns only or cities and is that they should not be broken open - lest thieves and pilferers &c should be let in. Another and which is the most forcible reason, rests on the public and Gen. good, and is that the breaking doors should spread general terror thro' the neighborhood and would often be productive of the most dreadful consequences to families thus broken in upon.

When a man makes a mansion house for himself intending thereby to avoid creditors and keeps an other house open, this

Semaines case in Co. rep. & case of Gousell & Lee in Cowp.

# Trespass.

mansion house shall not protect him, for the reasons above mention=ed do not apply.

An officer may enter a house in any way in which he does not break the peace. This is the law generally.

Questio vexata. All are agreed that outer doors cannot be broken open, but that inner doors may; but suppose an officer breaks an outer door and having entered and leaves will the levy be good? It is said that it will, for altho' the officer subjects himself to a trespass by entering, yet having entered his act is valid, but Mr Reeve is of opinion with those who entertain a contrary ~~opinions~~ doctrine.

If an outer door is entered legally a trunk &c may be broken within.

Mr Ro. supposes that private family rights ought never to be ~~injured~~ infringed, unless the law positively per==mits it. therefore the law in favor of creditors ought to be construed strictly.

Where a man is arrested on sunday (which can=not be done legally except in criminal case) for the purpose of arresting him a second time on Monday, now this second arrest will not be good, because it is a ~~gen~~ consequence of the first arrest, which was illegal.

Question. A. conveys land to B. being out of pos=

1st Trespasses by one and another in driving away
2 Ravenous beasts pursue into lands of another but
not kill them

3 Liability of the owner of Cattle

4 general defence warrants

5 of chasing with dogs — a little dogs most
6th of damage done by dogs not as being the
second time they not trespass against
7th right of recaption and entering on lands
for that purpose and of getting properly pro
vided with them to land of another
8th a right of way by means of a number of land
9th of Trespass by sheep — punishment and reasonable
if no intention of wrong but single damage
may be recovered
10th of damage done the land etc. the subject
11 when it may be found value it must be found
12 Recompence cannot see land for life on
going on trespass but work the value belong
to lessee then proceeds of them is one caughers
of land & the trespasser

13 then cost of replying bail Ecc 196

14 Enactment
15 proceeds to lay title the proceedings

# Trespass.

sion; the conveyance is therefore illegal, but B. had paid the consideration money, and contended that he could recover the money back, upon the covenants — This could not be done; for both parties had a knowledge of the illegality of the conveyance —

The law permits a man to go into the house of another ~~this~~ to tender or pay money — or to receive money &c &c this no violence must be used —

Inns may be entered by a general licence; but let it be remembered that the inner doors of ~~taverns~~ taverns are placed on the same footing as ~~other doors of~~ the outer doors of private houses, and this for many other reasons as well as this, that outer doors of taverns are always open to receive strangers and travellers &c, and were inner doors permitted to be broken every guest's room would be invaded, to the great inconvenience & terror of strange guests —

In Bullen Nisi. Prius, it is said that the beasts & ~~and goods~~ of a tenant, may be distrained for rent, yet if this tenant deposits his goods in a tavern door cannot be broken open to take them away —

A Reversioner may enter on the tenant's land to see if there is waste committed, but he must not invade the tenement

Ravenous beasts may be pursued on a man's land

injuries by cattle L^d Raym 749 Lemmy 5th ca 91

of the liability of the agister — of various
beasts, the injuries of other beasts Salk. 246
Cro Jac 321 1st term 336 — of general sand
Warrants 2d Wilf. — weight of cattle
is taken away — levy on cattle goods by Commission
order — of flood levant & couchant yet
liveries does not lie 1st Wilf 55 —
of chasing with dogs 1 Croke Car 254 Dyer 225
5th Roy 639 of killing beasts

To consider whether it ought be
enlarged

1st Land levant & couchant off and enlarge
upon and impound & sold the judgment
yet no liveries as commission the injuries judgt
may be given in evidence 1st Wilf 55

2 Nelly bound to B and years three loan B entd them
as liveries of his land but B entd time from the
same

# Trespass.

but not hunted thereon Cro. J. 621.

Where a man has found a bee hive on an other's land, he may by custom enter to take the bees and honey.

A man may enter an other's land to get his own property which may have been taken there, or thrown thereon by some providential act, but no injury must be done to the land.

So where a man purchases land the law gives him a right of way to it.

When a man ~~claims~~ claims land by a title, he may go on it, notwithstanding, he is not in possession of the premises.

## Statute of Com. relating to Trespasses.

There is a statute in Com. relating to trespasses on real property, which it will be necessary to notice.

When trespasses are committed on lands (as where trees are cut down) this stat. not only gives the party a right to recover such damages as might have been recovered at Com. law; (~~which~~ but also a treble) ~~but~~ damages & a penalty for each tree cut down.

You cannot recover on this statute, where there was no trespassing intention or intention to do wrong; as where trees are cut by mistake &c.

3d of selling land or her neighbours land. unless upon
bonds or engages sufficient
4th Trespass by which a bill may be found the
crafte of pleading before a petit bill or bill which
pass the justices of translation the future then
taking a bond of the obl to proceeding his claims and
the copies due transmitted to the court having jurisdiction
the object of the bond
5th of the declaration in bryefs
6th Jousments and be said & mad sur legeltes or the
principles of the commonwealth law in an action of bryefs
~~on jousment~~ or an jouden — an jousment
consistue her fellow bennet in bryefs the seal of an
subpoen to law ought of every common opinion on
forum of one against another — length of prefixes con
under an exchequer claim may take among the
1st or 3d Jousts pasly & Prescum
Copyholdy ~~[illegible]~~ on breach no common may
maintain action against a stranger but not against
lord, other only in case of enclosure destruction
for stipend nurses may may maintain trespass
not lives and but to not demisches in proof of law
7th being by law or fact on judgment
8th Forrable action 2 Ed 251 Stubbs 3 Edw 1584 England

# Trespass.

One action under this stat. recovers damages as well as the penalty.

A man may trespass, claiming an adverse title, and no penalty shall be recovered on this stat.

Altho' an action is brought upon the stat. and not trespass is intended, yet if the Pft. has sufficiently stated a Trespass in his declaration, he will recover common law damages.

If a jury bring in single damages when they ought to have been double, or treble, the court may double or treble them.

When bars &c are thrown down, extra damages are given.

So when a man sets either his own or his neighbours land on fire, he is accountable for injury done to others, and this is the common law construction.

There is also a penalty given for gathering hazlen-nuts &c of which wax is made.

Under this stat. where one man suspects another of having committed a trespass, he may sue him, and it lies upon the Trespasser to acquit himself by his own oath. There must be however some grounds for suspicion. This practice is unknown to the com. law. tho' Mr Reeve presumes that it is nothing more than what Chancery permits

# Trespass.

every day. It is not common in courts of law.

This ~~estate~~ stat. enables a man to distrain as well as to bring this action.

Trespass to try title, is now very common in Connect. Let us exemplify the manner in which this is conducted. Let A. & B. be the parties, both claiming ~~both enter~~ B. enters on the land of which A. is in the pedal possession, cuts trees and carries them off; Assues B. before a magistrate, upon which B. puts in a plea of title. The cause after this not being ~~tried~~ by the justice, is of course carried to the county court; to do this however it is necessary that the justice takes a recognizance of B. the claimant. This bond is given to compell B. to pursue his claim to trial and not as a punishment for the trespass, if B. should ~~fail~~ get defeated in his claim. Thus is the title tried and judgment given for him who is found to be the just claimant.

Both the Eng. and Con. limitation to this action is three years.

There is also a restriction respecting ~~costs~~ costs. Where a man does not recover more than $7, he shall recover no more costs than damages. This rule does not apply where the title of land is in question.

# Dissiesin or Dispossing

Dissiesin upon chattels real as well as real estate, is now remedied by a writ Ejectione firmæ or Ejectment. In all cases of disseisin whether by violent means or otherwise, the party dispossessed may consider it an Ouster or Disseisin, tho' if by violence he may bring Trespass. Where a man enters under a claim he may be considered as a Disseisor.

There have been many ancient remedies in Eng. for recovering real property, which are now done away; but even at this time if a man has been out of possession 20 years which takes away his entry and leaves him to some other action than Ejectment.

The remedy by action of Ejectment was annually made use of for the purpose of recovering a term for years, but is now applicable in almost every state in the union to the trying title to Real Estate.

Mr. B. has shewn us at full length in what manner or way this action was formerly conducted by the following example.

A claims to own land of which D. is possessed. A. enters on the land and makes a lease to B. for 3 years. A. & B. are agreed that their neighbour C. should enter and turn B. out. Now B. the lessee of A. brings an action of ejectment against C. upon which C. writes a friendly letter to D. telling him to come and defend for that he has no ground of defence himself. & therefore unless he enters a recovery of the premises will be had. If D.

# Dissesin.

entire the cause then stands B. vs D. formerly B. must prove entry, lease, ouster, and title - but now the manner is much shortened - B. bringe an action against C. without having had any lease, or having been turned out upon which C. sends a letter to D as before - Demurer and prays to be made deft, which the court will suffer upon condition that he will confess Lease, Entry and Ouster (being a string of legal fictions) which when done nothing remains but a fair trial of the title. It may be however that D. will not confess Lease, Entry and Ouster. In this case then nothing is proved, but the court will order C's name to be inserted and a recovery against C. will aft D. for if he will not depend it will be taken "pro confesso" against him -

This action is brought as well to recover land as for damages, tho' in Eng. (I presume) nominal damages only are recovered - As nominal damages only are recovered an action of Trespass will lie for the mesne profits -

In Lon. there is no legal fiction at all but a direct action. The Pltf. states Seisin and that he was dispeized &c -

Here this action may be brought for the land, as well as for damages, and either real or nominal damages may be recovered: If the latter an action of trespass for the mesne profits may be brought -

Where it is a doubt whether real or nominal dam

# Dissisin.

=age are recovered, proof must be let in to ascertain which.

# Declaring in Trespass and Ejectment.

Young men about to enter on the practice of the law are something frightened with ~~the idea~~ an idea of the difficulty of drawing declarations and pleadings. Let me be consoled by this circumstance, that if they make themselves masters of the law, they cannot mistake in declaring. A ~~thro~~ thorough know=ledge of the law, will render it certain and easy.

As to Trespass upon real property. In declaring it is necessary to aver "that you were possessed of a certain lot of land" (describing it) that the Deft. with force and arms broke the Pltffs said close" (this does not mean an actual force of arms but a legal force) that "with the like force he entered into the close, and cut down" &c (describing what the Deft. actually did) "to the Pltffs damage so much, and for this he brings suit" &c.

It is necessary to state possession, but the ground or right of possession need never be declared.

If the injury is done by your neighbours "cattle" you state that "the Deft. entered with his cattle" &c

Ejectment. In declaring in an action of eject=ment according to the Engl. mode you must state "possession

forcible Entry & Detainer. The Land as formerly criminal as well as civil among a court is called and a Jury impanell'd the object is not to try title but was there a forcible entry of found Execution issues to Land and the person entered. of course there is no prejudice to the title forcible detainer what it is both may be guilty in cases of detainer there will be a fine —

An Execution upon a Judgement of Ejectment and the difference betwixt they and a bay on bond to satisfy a debt —

injury joint it is Considered all are found guilty damages against Ann 100 & Blue Knuckles & Elias Brooks this Verdict is manner the all may be had against or both various damns against all

# Nusance.

of a term of years" &c. But in Con. where no fiction is used, you must state a seisin of the Pltf. (if the injury was done to a freehold) that is that the Pltf. was seised at such a time, and at such a time the Deft ejected him, that the Deft. still holds the Pltf out, to his damage so much, for which, to gather with the surrender of the land the action is brought.

In case judgment is recovered, and before it is enforced the Pltf. dies, how is it to be enforced? Where personal property (i.e. damages) only is recovered the Exr may bring a scire facias to revive the judgment. but when the land and damages are both recovered, the Exr must bring a scire facias for the damages which are personal property, and the heir a scire facias for the land which is real. This is a mixed action.

# Nusance.

First what a nusance is & secondly its remedy. Nusance is not merely an injury to ~~real~~ personal and real property, but in a certain sense it may be said to be an injury to a man's person.

**I.** A Nusance is any thing done to the hurt or annoyance of lands, tenements, and hereditaments. There are a species of nusances which are public. Concerning these nothing more

Vide. Christian's notes to B.C.

Euc. Elx. 118.
Salk 459 –

9 Co. 58.
Salk 459.
Co. Lan. 300.
Euc. Elx. 118. 510.

# Nusance.

will now be said, than that such nusances affect the public only, and therefore must have a public remedy. In these cases no one man can have an action, unless he has received a personal or special injury.

A private nusance then is an injury to personal or real property, but it is not a direct attack upon it but operates consequentially; for if it was the former, it would be Trespass. vi et armis. Hence it is that a man by using his own property may commit a nusance. the rule is "Sic utere tuo, ut alienum non ladas"

1st. Overhanging a man's house is a Nusance; for the maxim "Cujus est solum ejus est usque ad Cœlum" will not extend to permit overhanging.

2dly. Obstruction of ancient lights is a Nusance. But what are ancient lights? Agreed on all hands that they must have been made ~~a longtime~~ or erected a long time Ld. Mansfield (I am informed) in a late decision in T. Reps. has called them ancient, if they have been erected 20 years.

All nusances in these cases depend upon priority.

3dly. The exercise of any offensive trade, or the erection of any offensive business buildings are nusances. As tanners, Tallow Chandlers shops; so the erection of certain kinds of buildings too near an others houses or lands as stables (where the noise of the horses interrupts the peace and sleep of the

1 Roll. 89.

2 Roll 141

# Nusance.

neighbours &c. But it would seem that if the man had no other place to have built his stables &c, that they would be permitted to stand. The privation of a fine prospect is not a Nuisance.

There are also many nuisances to lands. As where ponds are raised and overflow the neighbour's lands. Where the overflowing has proved beneficial to the land it has been determined to be no Nuisance.

So the carrying on of some ~~hay~~ trades is a nuisance as the smelting business. this also affects real property.

So where a stream of water runs thro' a man's land, if it is diverted from "ubi solebat currere" it will be a Nuisance.

So it will be a nuisance if a man above corrupts or spoils a stream, by building Dye-houses, tan-vats &c. To be a nuisance however it must interrupt some use to which the person below had been wont to apply it. So that whether there will be nuisance, yea or nay will depend upon first occupancy.

It matters not whether the Spring issues on the man's land who does the injury. He cannot claim the water, and say he will turn it off, use it, corrupt it &c. He may how=ever turn some of it, and it will be no nuisance, provided he leaves enough to answer his neighbours purpose.

Wherever there is a good site for a mill below and one is built thereon, the ~~mill~~ water above must not be diver

# Nusance.

ted from it. Where a mill below would be of more use than the water ing of cattle but ~~below~~ above the latter will be prohibited to the advancement of the former; priority notwithstanding.

There are cases where a man professing the same calling, trade or vocation will not be allowed to follow or pursue the same near another of the same calling &c upon the ground of its being a nusance. As ~~where~~ where a man sets up a ferry near another having a prescriptive right which is an incorporeal hereditament.

But where a man having such right attempts to keep a ferry, he must do it with fidelity, the cases of millers, sch oolsr, taverns &c are exceptions to this rule for a multiplicity of there, will only advance the public good.

Mr. Kent supposes that in Con. where lands are given to a man on the condition of keeping up a mill, this would seem to preclude the building an other near the same place, upon principle; but the case is not settled.

# Waste.

The remaining injury to Real Property is that of Waste. Relative to this injury, there is much law in Eng. which will not be applicable in these United States.

# Waste.

The action of Waste at Com. law, was formerly maintainable only against tenants for life, made so by operation of law. Viz. tenant by the Courtesy and tenant by Dower, because other tenants might have covenanted in their leases or deeds to prevent Waste, but by the stat. of Gloucester 6 Ed. I. other tenants were made liable, as tenants for years &c.

Waste is some injury done by the lessee or some one under him, or by his permission; and the reason that neither trespass nor ejectment could be brought in these cases is for want of that possession which the law in such cases requires a Plff. to have. A. leases to B. the latter being in possession cannot be ~~said~~ sued (if he pulls down a house) in trespass by A. the lessor because he is not in possession.

By the stat. of Gloucester damages are not only recovered but the thing wasted i.e. it is a forfeiture of the property, & as it respects this it is immaterial whether the waste was voluntary or ~~permanent pulls~~ permissive.

The lessee is liable not only for waste committed by ~~third persons~~ himself but for that committed by third persons, strangers because, he is in possession, and can recover of such third persons. Mr Powell says it is hard law to make him liable for the waste committed by every ~~struggler~~ stroller or bankrupt who may invade his property without his knowledge.

Co. Litt. 58.
2 Roll. 815.

B. Jac. 182

2 Roll. 814.
Hob. 234.

Co. Litt. 58.

2 Roll 820.

# Waste.

There are thousands of instances of Waste applying either to houses, lands or trees.

It is waste if a lessee suffers his house to be destroyed either by exposure or by the act of an other. He is not liable however to the full extent for providential accidents &c; But of this hereafter.

The tenant must use due care and diligence. He is bound to repair unless there is a contract to the contrary.

It has been held that where a man builds a new house or enlarges an old one, even if he benefits the premises, it will be Waste, on the ground that there must be no ~~alteration~~ alteration in the estate. Mr R. presumes that this would not be so in law.

With respect to changing or altering land, or meadow into arable & vice versa; the same ideas of waste have prevailed.

A lessee altho' he has a right to dig &c yet he must not open new mines; unless the land is leased to him "without impeachment of waste"

As to timber. The word "timber" is appropriate in Eng. The tenant has a right to plough bote, fire bote, hay bote and hedge bote; but he is not at liberty to cut down wood for other purposes.

If there is dry wood on the premises greenwood must not be taken for fuel. Timber may be cut down for repairing but the tenant is bound to repair, if their is no

=version - He is liable as a trespasser and his trespassing is a for=feiture -

The lessee it has been said is not liable for light=ning, or the attack of the common enemy, yet it has been determined that the tenant is bound to repair if the property wasted is tenantable i.e. is not wofully or totally destroyed, so to render reparation inconve= Co. Cl. 690. ~~to~~ nient and impossible - 10 Co. 24.

When a stranger commits waste, the Lessor has no action, but the lessee has, who is answerable to the Lessor. Bof. 24. Co. Cl. 18. 290. Co. Litt. 50.

2 Roll 824.
Co. Litt. 40
Co. Jones 688.

2 Roll 828.

5 Co. 12.

# Waste.

timber on the premises.

It has been held, where a man had timber not estate, but sold it to enable him to buy more which was estate, he was guilty of waste. Mr Bacon presumes it would not be so now. All these rules are made so rigid, for the purpose of restraining & binding lessees, and benefitting lessors & land holders.

If the lessor excepts the woods in the lease and the tenant cuts down &c it will not be waste but trespass, for the lessor was never dispossessed of the woods.

But who may bring the action of Waste? Suppose an estate is given to A. for years & for life remainder to B. in fee. Then the remainder man is in the place of the lessor and therefore may bring the action.

But suppose an estate is given to A. for life, remainder to B. for life, remainder to C. in fee. A. commits waste, B. cannot sue because he is not the remainder man in fee, nor neither can C. sue because he is not the immediate remainder man. A. then is dispunishable for waste & had case. But Chancery will grant an injunction.

If the tenant for life dies, no action of waste can be brought against his Exr.

Tenant at Will has not been mentioned because he cannot commit waste for he has not a sufficient pos-

Reply cartte
for case
2 Ven. 738.

1 P. W. 528.
1 Ver. 264. 3 Atk.
219. Ainslie
167 or 169.
2 Bro. Ch. 69.
1 Ver. 521.
3 Bro. Ch. 599.
564.

# Waste.

## Leases "without impeachment of Waste" and pow. of Cha. to prevent Waste.

It is very common to make leases "without impeachment of Waste" In such cases the trees, timber, &c may be cut down and used by the tenant, for in them he has a vested property by the lease.

It will be recollected that Chan. grants injunctions to stay waste, when even an action of waste might be brought at law. Chan. has gone farther. This court has granted an injunction to stay waste where a lease was made "without impeachment of waste, and the timber or trees &c had been taken whimsically, maliciously, or wiously, Where lands are leased "without impeachment of waste" a property in the timber &c is thereby vested, and it has been thought a stretch of power for Ch. to interfere. This will not be done except in cases of whimsical or malicious waste, either upon houses or trees and where in fact such waste was not intended to be permitted at the time of making the lease. As where trees of ornament were cut down. or houses stripped of their heads appendages &c &c. There are other cases of waste in which Ch. interferes. As where A. is trustee for B. the legal title then is in A. but still Ch. will not suffer him to abuse the property by wasting it &c. The "cestui que trust" must not abuse it.

1 P. Wms. 524.
1 Ves. 264.

. . . . . ?

Amb. 176.

1 Salk. 161 —

# Waste.

When there is an estate for life to A. remainder to B. for life remain=der to C. in fee, here altho' A. is shielded at law against being sued for waste yet Chan. will grant an injunction to stay it, on application of the re=mainder man in fee.

Chancery interferes to prevent waste upon the property of an unborn infant. There is one set of cases where Chancery interferes upon a different ground, as where there is a lease "without impeachment of waste" and the tenant during his term does not cut down much of the timber, until just before its expiration, and he then con=cludes to make a sweep of the whole, and this to answer a dene=ficial purpose to himself. Chancery will in such a case interfere.

The estate of the Mortgagor in possession is not a tenancy at will, but a distinct species of Tenancy, the mortgagor here has not a right to commit waste, because thereby he lessens the se=curity.

When a Mortgagee in possession dies, the Exr. must re=ceive the redemption money; but may such Mortgagee commit waste? If he does he must apply it to the payment of the Mort=gage and it will be payment so far as it goes.

# Evidence —

# Of Evidence.

There is almost an infinite variety of questions made, relative to Evidence, which cannot be treated of in any moderate length of time — But there are certain general and leading rules, with many exceptions to those rules, which will govern in almost all cases — These will be the subject of the following lectures.

Evidence, or testimony, may be classed under three distinct heads, Viz. — I. Written testimony or evidence, which includes all kinds of written evidence, from unsealed instruments, to records inclusive — II. Parol Evidence, which includes all which may be derived from a sworn witness, whether it be delivered by him viva voce in court, or whether it be a deposition in writing: For altho' altho a deposition be written, yet it is derived from a deponent who having taken the proper oath is called upon to testify, as to the certain facts, and its being delivered viva voce or taken down in writing does not alter its nature —

Evidence of either of these two kinds is supposed to go directly to these the principal facts — But there is a III. kind called Presumptive Evidence. This is testimony offered

from the evidence or proof of other facts: whether these collateral facts be proved from parol or written testimony. If it be inferred from parol proof, it is called Presumptive testimony. As suppose A. on Saturday evening saw Sam. Stiles riding towards Litchfield, on the turnpike road, not far from the house — Not long after B. saw him on the same road going from Litchfield, — and in the mean time C. saw some one pass the meeting house on a horse ~~who~~ that answered to the description of S.S. These facts would raise a strong presumption that S.S. was in Litchfield on Saturday — But if the presumption be raised from a written instrument, it is called constructive evidence — As if A. executes a lease of land to B. reserving $10 rent: — for this rent A. sues B. the point to be proved, is, that B. accepted the deed, and agreed to pay $10. It appears from the face of the deed that it was delivered to B.; parol proof is introduced to prove that B. went on the farm and cultivated it — and perhaps that he had before paid rent at the rate of $10 From all these collateral facts, the presumption arises that B. agreed to pay the $10 rent. This is called constructive proof.

## Of the causes for excluding Witnesses.

There are three general causes for which Witnesses

2 Roll 618. or
698 Brown. 4 Ex
2 Show. 431. 1 Salk.
280. Hard. 264.

# Evidence –

are excluded – Viz. Interest – Infamy – and Atheism – there is likewise an insulated case to be taken notice of in a subsequent part of the title –

A mere Relationship generally does not exclude. A father may be a witness for or against his son – the son for or against his father – a brother for or against his brother &c &c. —— But in the argument to the Jury, all advantages which need be – are taken of all such connections; whether it be founded in consanguinity – affinity – or friendship: For altho' such witnesses are competent, yet the Jury are judges of the degree of credibility to be attached to the evidence.

To the preceding rule there is one exception, Viz. the case of Baron and Feme – These are not permitted to testify for or against each other, not only because of an interest which each may have in the property of ~~an other~~ the other but also from a principal ~~of~~ principle of policy – The law is peculiarly anxious that domestic peace and happiness be preserved, particularly as between Husband and wife –

And altho' the parties agree, that they will receive the testimony of the husband or wife to one of them, yet the court will not permit it. Altho' if the incompetency proceeded from interest only, such might be introduced.

It has been made a question whether this rule

2 Hace. 402.—

# Evidence.

did not likewise apply to wifes *de facto* merely — but the law is settled that it does not —

There is one acknowledged exception to this rule, by which a wife may testify against her husband, and *econverso*. i.e. when it becomes necessary ~~to~~ for her to swear the peace against him, for ~~ill usho~~ ill-usage &c. then his, or her oath is admissible evidence —

There is likewise an other instance in which it is said the husband or ~~wife~~ the wife are good witnesses, for or against each other — to wit in the event of a criminal prosecution of either of them for ill-treating the other without adopting the frequent method of obtaining sureties of the peace &c. The prosecution being entirely at the suit of the public officer —

But on this subject, there is a great diversity of opinion among lawyers, for it is by no means a conceded point, that when the prosecution is at the suit of the crown, the wife may testify against the husband (*or econversa*)

Those who oppose the doctrine object to it, that it subjects the husband and family to the ill humour of a bad wife (or mutatis mutandis) who by entering a complaint before the prosecuting officer, founded or unfounded; and may destroy the peace of the family —

Plut. 116

1 J. B. 1.

1 Vent. 144

Stra

Brownl. 47

# Evidence –

On the other hand it is said that the complainants reputation will prevent a conviction, there being no other evidence, if the complaint be unfounded, by detracting from the credibility of the tes. And also if it were not allowed, the wife or whomever was the weakest would be subject to the cruelty of the strongest without hope of ~~the~~ protection, for it is not to be presumed that he will treat her ill, before people – This latter opinion is confirmed by a decision reported in Hutton, (Lord ~~Bidley's~~ Dudley's case) where the wife was permitted to testify against the husband – But some obiter dicta have fallen from Judges, by which it would seem they did not consider this case as law – These obiter dicta of Judges, have given occasion to most of the elementary writers to deny the case in Hutton to be law – But in the 1 Ventris it seems to be expressly recognized – And in Azand's case (Strange Rep –) the case in Hutton is consequently stated to be law, and the principle seems settled as Mr Reeve thinks, and Mr R. thinks that there must have been some case decided, which we have not got, or perhaps in some state trial, wherein the principle is settled for Strange is a very correct Reporter –

There is also ~~at~~ an other case, in which it is said by many elementary writers, that a wife may testify against her husband, namely in the case of treason. But Mr R.

c 10 Cent. 197—

# Evidence –

can find no case, which supports this principle, and in Brown=low it is denied – A reference is sometimes made to the state trial of Russel, in support of the position, but nothing is there said about it. It might however ~~have there decided~~ have there been decided in that case, and not reported; and at any rate the point may be considered as a disputable one –

The relationship between Client and Attorney renders the latter incompitent to testify ~~to~~ to any fact, confidentially intrusted to ~~his~~ him by his client in the case –

Authors frequently ~~frequently~~ lay down the rule, that an attorney or counsellor shall not be compelled to testify ~~to~~ —— But the rule is more extensive, an attorney shall not be permitted to reveal before the court or a witness against his client, any fact ~~confidential~~ confidentially intrusted to him – This rule is founded both in policy and Justice, and prevents a dangerous breach of trust –

But whatever an attorney knows relative to the matter upon trial, and that not as attorney, having acquired this knowledge in some other mode than by a confidential disclosure from his client as such. he shall be compelled to testify, tho' it bear hard upon his client –

A question has been raised whether any person, with whom the party in the action has intrusted the know=

Exp. M. p —

## Evidence.

=ledge of a particular fact, known only to himself, and which from the nature of it never can probably be found out shall be compelled to discover it in court?- The fact not being communicated to him as attorney, but as a friend in whom the utmost confidence was placed by the party in the suit.

If the confidence reposed ~~in him~~ be already in part betrayed, so that a rumour of the fact has got about, then there is no dispute but the person shall be compelled to ~~testify~~. But is there not something morally wrong in compelling a person to betray the confidence re=posed in him and perhaps ruin his friend, when other=wise the act or offence would never have been known? Yet it has been decided in Eng. that such person shall be compelled to testify. And in Con. it has been so ~~divided~~ decided also, but by a divided Court.

## Of Witnesses made Defts.

No person may be a witness in his own cause. But it is easy to see that one may be made a deft. in a suit by the Pltf. with others on purpose to prevent him from being a witness. And this is not unfrequent

# Evidence –

=ly the case: particularly in cases of assault and battery –

But such a proceeding is not allowed by the Courts to effectuate the purpose intended: If on hearing the evidence there appear none against the person, the real deft. may move the court to have his name struck out of the record – which the Court will do –

But it is a principle in Courts never to decide as to the weight of testimony – Hence if any, tho' slight evidence ap=pear against the person, an other course is adopted – Viz. The real Deft. moves the Court that this Deft. (whose testimony he wants) be tried first; and this the Court will direct. If the Jury find him not guilty, or otherwise find for him, he immediately becomes a compitent witness for the real deft. And altho' he be found guilty, yet if the act constituting the crime of which he was found guilty, were such as that he would not be interested in the event of the succeeding suit, i.e. if it be not such as that the Pltf. can take out execution against either, or all, at his election, then he may still be a witness –

It was a litigated point question whether Ac=complices in a crime, could be witnesses for or against a Deft.

But it was found, that a vast many crimes

2 Hans. 482.

# Evidence –

would go unpunished, if they were excluded, It has therefore been customary for one or more of the guilty persons to turn witnesses for the public, in order to convict their companions.

But altho' in such cases, they be competent witnesses, yet their credibility is with the Jury – In such cases it is always a matter understood, that such as turn witnesses to convict the others, be excused from any prosecutions themselves. The mere fact of their having turned witnesses is of itself no excuse – but it is always considered that the honour of the public is pledged, that such witnesses shall not be prosecuted – .

## Of Persons interested –

It has already been observed, that the great causes of incompitency in a witness, were Interest, Infamy, and Atheism, or such principles, or such a defect of knowledge, as rendered it probable that the person felt not the peculiar obligation of an oath.

We shall first treat of Incompetency by reason of interest –

The interest in order to incapacitate the witness, must be a pecuniary interest. And if it be a pecuniary interest, it is sufficient, however small the interest may be: for if it be Cents

or $600 it is equally improper to examin into the quantity. And it is as well known that 6 cents will ~~have as much influence~~ may have as much influence upon some men, to cause them to swerve from the truth, as $600 would upon others –

And yet the best friend, or the nearest relation to the party, is a competent witness (except the witness be a wife &c) and always admitted to testify, if there be no ~~exception~~ other exception taken – But it is proved by daily experience, that the influence arising from friendship, or these causes, may be greater perhaps than any pecuniary interest: The credibility of such testimony therefore, is a question for the jury to find.

## Of interest in the event &c.

A person offered as a witness, may be interested either in the event of the present decision, or merely in the question –

An interest in the event, always excludes. But an interest in the question merely, does not.

But it may be difficult to distinguish between a consequential interest in the event, and an interest in the question –

An interest in the event consequentially is where the Judgment to be given ~~may~~ will lay a foundation for a suit in which the witness ~~will~~ may be party: As in the case of Bail

rendered for the Deft. as a witness:— it is not certain that he will ever have to pay the execution against the principal, for it is not certain that he will ever be sued as bail — but still it is a contingency which may happen and the Judgment in the case now on trial, will lay the foundation of ~~a under-sequent suit~~ such a suit — So if A. agree with B. that he will institute a certain suit, and happen to fail, he, (A.) will pay half the expence of the suit A. becomes consequentially interested in the event —

But a nice distinction is here necessary to be drawn Viz. Where this consequential interest in the event is a mere possible contingent interest, it will not exclude And the following, is a strong case: suppose A. a man of 80 years old to have commenced a suit to recover his farm Black acre — that before the trial he should become very sick and as the appearances are, at the point of death: under all these circumstances the trial comes on, and B. his only son and heir is brought into court to testify, ~~at~~ and altho' he may ~~testify~~ the next day inherit the whole estate yet he is a competent witness and may be sworn as such — For his is but a mere possible contingent interest in the event A. may make his will and devise away this estate: B. may die first, or having made his will and give

given it to B. he may alter it— the will may not be established— he may get well of his illness. And finally this judgment doesn't in the sense used above, lay the foundation of a suit against B.—

An interest in the question— is where the witness may have just such a case as the one at Bar. But being wholly independent of it, and disconnected with it, the decision of the one at bar does not decide his, neither lays the foundation of a suit against or in favor of such witnesses. A. is publicly prosecuted at the suit of the public, for a breach of the peace and knocking down B's teeth— Now in this prosecution B. is a competent witness, and may testify— Yet B. intends bringing a private suit against this same fellow, to recover his damages, he has therefore an interest in the question, inasmuch as it has an effect on the public pulse, and gives him for that reason a better chance of recovery in his civil suit— But as he is to get nothing by a conviction of A. on the public suit, the fine being paid to the treasurer, and as the verdict & judgment can be of no service to him in his civil suit, he cannot be said to be interested in the event—

Suppose again A— be prosecuted for usury in receiving too much. B. who paid the usurious interest, may be introduced as a witness to prove the fact. He has no inte-

=terest in the event. If A. be convicted, the record of the convic=tion can never benefit B. in a private suit — and if A be fined the money goes into the public treasury not to him, still however B. must be supposed to feel a sort of interest, or influence in the question —

Again A. & B. have severally brought each one a package of goods from C. — D. claims that the property is his — the sues A. for his package — and B. may be intro=duced as a witness for B. has only an interest in the questi=on — The property which B. brought is in precisely the same situation as that which A. brought — but it is not the same property — If D. recover of A. it is not a recovery as to B. who neither gains nor looses by it — it will lay no foundation for a suit against him: But yet it is to be supposed that B. may feel himself a little interested ~~in the question~~ or influenced in the question —

~~Again A. & B. have severally brought~~ It is agreed by all that if a person be offered as a witness who is directly or ~~consequently~~ consequentially interested in the event he shall be excluded, unless the interest be a mere possible contin=gent interest in the event — And the following has been a=dopted as a criterion to determine whether the person ~~the person~~ be interested in the event i.e. if the judgment to be rendered in

the case on trial can be used to procure a judgment in a subsequent suit to which the witness shall be a party, the witness is said in this case to be interested in the event – and it matters not whether such judgment lay the foundation of the suit or whether it be made use of in evidence –

The mode of ascertaining that a witness is thus interested is either by introducing ~~witnesses~~ testimony to this effect, or to put the witness upon his voir dire – Both of these methods however cannot be adopted: if the opposite party appeal to the witness himself, putting him upon his voire dire, he makes him for this purpose his own witness: – It is a principle that a man shall not impeach his own witness, the party shall not therefore afterwards being in evidence to show that he is interested – And the rule also embraces the case of the party's having before introduced testimony to this effect and an attempt be made afterwards to put the witness upon his voire dire – But Mr Reeve does not think the reason of the rule applies when the appeal made to the ~~witness~~ oath of the witness himself is subsequent to the introduction of his other evidence –

Of such witnesses be bound in honour only in the event of the judgments going in a certain way to pay part of the costs

Hard.t 9 & 10 L
35 & 4 Bur. 2257

Hardness 331.

see Bd. m.p.
Peak.

or any thing of this sort he shall be holden equally in the event as if he had been bound in law also.

The questions usually put to a witness on his voir dire are commonly such as the following "Are you interested in the event of this suit?" "Can you be interested any, which way this cause turns" or "Are you any way affected by the suit &c?"

But as to any interest merely in the question it has long been a very litigated point whether and in what case it should render the witness incompetent to testify.

Until within a few years a practice has obtained as in Eng. to admit in some cases persons who were thus interested and in others exclude when in either case the interest was quite as strong. In civil cases the witness was universally excluded but in all criminal cases except Viz. Forgery — Perjury — and Usury — they were admitted. Thus there was no signetry in the law on this subject, for the distinctions were merely arbitrary. In the case of an assault and battery the person injured by it was a good witness in a criminal cause. In a civil cause where the bias was equally as strong, he was not permitted in the case of Perjury. Forgery — or Usury — the person having suffered more, perhaps by the wrong done was not in a

criminal suits admitted to testify —

The origin of the distinctions we shall endeavour to trace and then point out what law is now on the subject —

With respect to the distinction between civil and criminal suits as to this particular there seems to be no reason for it, but as the line was ~~only drawn~~ easily drawn it was well enough perhaps.

As to the exceptions in criminal suits of Perjury Forjery and Usury the distinction appears altogether unreasonable — No reason is given for it in the books — Mr B. has conjectured that the following might be the reason Viz. in the case of a prosecution for Perjury the person injured by it gets a gratuity or fine of £10. on a conviction. This exclusion may well be accounted for therefore on the ground of interest in the event —

In the case of Forgery and Usury Mr Bevie is inclined to the opinion that in the event of a conviction for these crimes the instrument forged or upon which usurious interest was received — was brought into court and cancelled: this at least he is persuaded is the case as to Forged instruments; and from many passages which he has met with in the books he thinks it is the case also with usurious instruments —

4 Burr 2257.

9 Dunn. Bart
& Bather and
as to Fitzwinta
see L.O. Rep.
996. 1 Dutteg.
6 Mod. 211. 2.
2 C. Rep. 30. Sta.
652. 2 Kell.
694. Ve —

# Evidence –

If this conjecture (for it is merely such) be true it is accounting rationally for the rule – because in that event such persons become interested in the event; and not merely in the question.

But in cases of usury the person injured might be a witness if all the money had been paid on the obligation for this removed the interest –

So it was a rule that if in any case an interest in the question excluded, it must not have been a mere contingent interest –

But Ld. Mansfield prepared the way for a decision which was afterwards had, breaking down most of these distinctions. He says the only proper mode of determining whether a witness is so interested as to render him incompetent to testify in the solution of this question. Is he so interested that the present judgment may in any manner hereafter be brought up for or against him? If he be then he shall be excluded if not then admitted –

But the famous case of Bent and Baker has determined this matter – it is there expressly decided that an interest in the question merely, shall not exclude. And this is now a general rule according to the Eng. law both in civil and criminal cases –

# Evidence –

This question has been agitated and much litigated in almost all the states — In some states the old law is retained, in some the new is introduced –

In Penny.ª the old law obtains: – In N York & N Jersey the new is adopted – In Con. the old law obtained – otherwise now.

The question has likewise been raised in the National courts. In the southern circuit including Georgia & the new system i.e. that established in Burt and Baker was adopted – In the northern or eastern the new was also adopted – In the middle circuit viz. that including Penny.ª & the old law was confirmed. But the question having been finally raised in the supreme court of the U. States the principles established in Burt and Baker were recognized and became the law of the supreme court of the U. States –

The general rule then is that no interest which the witness may feel shall exclude him on the ground of incompetency except it be a pecuniary interest and an interest direct or consequential in the event – But this rule has exceptions — A. was to sign a bond to B. for £ 5. B. wrote the bond which appeared to be for £. A. signed it but it afterwards appeared that B. by some slight of hand caused A. to sign one for a £ 100. B. was indicted and A. introduced as a witness – — but was declared by the court incompetent –

contra. 1 Vent.
49 ——

2 Roll 686. Obiter.
114. 5. 10 Mod. 190.
Hardress 531.

But even before the case of Bent and Baker this decision was declared not to be the law.

The established exceptions to this general rule are

I. When from the nature of the case there is a necessity to dispense with it, or in the alternative to destroy the operation of a law.

As in the case of the stat. of Winton ~~or the black act~~ by which, if a robbery be committed, the hundred, or tything, or county, within which it is perpetrated, is compelable either to discover the robber or to refund to the person robbed ~~to~~ the amount of goods taken from him. — In this event if the person robbed sue the hundred, he finds every one of the hundred who might happen to know of the transaction, interested in the event: but that the stat. ~~might be amended~~ may not be rendered nugatory he shall himself be admitted to swear to the commission of the robbery and to the amount of property taken — II. It is frequently and unequivocally laid down that Innkeepers are liable if loss or damage happen to the goods of their guests, but in such case how is the law to be carried into effect? In nine times out of ten, none but the guest knows any thing of the property which he may have in his trunk or portmanteau. Mr Bunn apprehends that by the English, and on the ground of necessity the Pltf. who interested must be admitted to the oath — ~~but~~ Nor is this kind of testimony so

Stra. 1054—

Stra. 500.
1096—

dangerous as we are apt to conclude since the Jury may believe or not and will weigh all the circumstances –

Note I. Is the daughter of the Pltf. a competent witness when the suit is brought for debauching her per quod &c?

She is not interested in the event for she can neither get or ~~loose~~ lose by the Judgment – She is not interested in the question because she can never bring an action for it being particeps criminis – She is a competent witness but not for the reason given Viz. that she is a witness thro' necessity –

Note II. A Guardian or Prochen ami cannot be admitted as a witness where they sue for ~~the infant~~ an infant or idiot, because they are liable for costs if they fail in the action – But it may be said that in such case the property of the infant is in the event answerable for the costs – This is not a sufficient objection to the rule. Tho' the Guardian may have a claim upon the infant and for these costs yet that claim may be satisfied, and tho' there be property enough yet the action brought for the infant may be of such a nature or so conducted that the court will not allow the Guardian to recover of the infant. And at any rate this judgment lays the foundation for a Sci. fa. in the Guardian to recover the costs –

Note III. When A. takes charge of B's case employs counsel

# Evidence –

looks out the witnesses, &c treating as he would if it were his own — he shall not be a witness ~~he has clearly and~~ unless he can clearly and satisfactory show that he was employed to do all this – by the Pltff. or Deft. and that he is a mere uninterested agent – Otherwise it will be presumed that he is interested.

– Rule VI. The Pltff. in a penal action (which may be brought by any one) shall not be a witness tho' in consequence of it the stat. be not carried into effect: for it is not like the case of the stat. of Mortmain – There has gone forth an opinion that the U. S. court decided that an interested witness should in no case be admitted tho' the stat. failed of effect. But their decision was confined to the foregoing rule –

The same doctrine is introduced in many instances in Con. and Massachusetts As in the case of theft – the person stolen from may swear the fact and recover three fold the value and he is permitted to testify not because ~~not because~~ of any stat. mutation but because without it, the stat. could not be carried into operation –

Under this rule of necessity also may be classed other cases: as where the original Pltff. in a suit over the sheriff for an escape; here the escaper may be introduced as a witness to prove that the sheriff voluntarily suffered him to escape – This mode

of proof is allowed for without it there is not generally a possibility of proving the fact – And yet it is easy to see that the sheriff in this way is wholly at the mercy of the escapee for tho' innocent he may be convicted – And it is ~~evidently~~ as clear also that the escapee is interested in the event, for if he can convict the sheriff he is wholly cleared himself; neither the sheriff nor the original Pltff. can afterwards sue him for the same debt; because no one shall recover two satisfactions for a debt, and the sheriff is *particeps criminis* and cannot take advantage of his own tort –

Precisely the same is the case of *Recevers* – The original pltff. may sue the receiver and bring in the original deft. as a witness to prove the fact, for according to the nature of the case he is the only person who can know the receiver –

**II.** The second exception to the general rule may also be said to be founded in necessity – Which is that of *Joint tort feasors* – The Pltff. may sue one and introduce the other as a witness to prove the commission of the fact. The witness is in this case interested because if he do not convict the Deft. he may be sued himself. This was originally ~~in necessity~~ founded in necessity but is now become a general rule –

**III.** A third class of cases excepted from the general rule

in that of agents — There may be admitted as witnesses for or against the principal in civil actions. This exception also sprung originally from necessity — As where J. S. delivered money to T. N. to be delivered by him to AB. — In a suit between J. S. and AB. — ontative to this money — T. N. the agent may be introduced to testify that he delivered the money to AB. T. N. is interested in this instance for if the money be not proved to have been delivered to AB. he is liable to refund it to J. S. —

And altho' the best evidence that the nature of the case will admit of shall be had, yet the nature of this particular case is such (no receipt having been given by AB. to T. N.) that T. N.'s evidence is the best: for neither the law nor universal practice makes it necessary to take a receipt.

But if it had never been heard of to pay money in this way without taking a receipt then this testimony would be excluded. And it is now an universal rule that agents thus interested may be witnesses —

IV. The members of a Corporation may sometimes be admitted to testify when the Corporation is interested in the suit And the criterion by which to judge when they may be admitted is this — If such members have any considerable interest they are incompetent; but if their interest is small they are competent.

1 Bed. 10 Q. 2 Silv
2 Bl. 2 Pl. 1 Tents.
3 Sh. 1 Tent.
3 Sh. 2 Tent. 3 Pl.
4 Mod. 4 & 2 D. Rep.
7 Ch. 1 Sh. Stal.
10 Cg

# Evidence—

This rule breaks in upon the symetry of the law—and introduces a new principle—In other cases the quantum of interest is not at all regarded—And the more modern decisions ~~adhear~~ adhere very generally to this rule—And more particularly because Stat. regulations have been made in Eng. which embrace almost all cases where it would be proper on the ground of the trifling nature of the interest, to admit. But the more ancient decisions do not so universally exclude on this ground—

The Con. law has fully ~~re~~ adopted the principle of necessity in respect to admitting the members of Corporations to testify; but has not adopted the distinction between a small and a large interest.— As if one of the Parish be present when a part of the Parson's salary is paid he shall be a ~~con~~ witness in an action respecting it, tho' as one of the parish he is interested. This is allowed because it is not always customary and the law does not require that a receipt be taken yet if a receipt ~~were taken be taken~~ were taken, the evidence would be excluded as of course—

But the rule excludes persons who are appointed as agents for the town or parish in its name to commence or carry on for the town &c any action; on account of any interest or anxiety such as supposed to feel in the determi-

=cation of the cause this rule is peculiar to Com. and is oppo=
=sed directly to the principles of the Eng. law.

V. It some times happens that persons become or are made interested in the event of a cause about to be tried on purpose that they need not testify in it this the law utterly discountenances.

If a witness became interested, after the right to have him as a witness has accrued, it is a rule with some restrictions, that the interest he may have in it shall not exclude him —

If the witness have been made interested for the purpose of excluding him; or if by some wanton or unnecessary act has made himself interested merely that he need not testify his interest notwithstanding, he shall be a competent wit=ness — As if he give bail for the Deft. or lay a wager with some one as to which way the suit will turn &c.

But if he had become interested by the act of God; or by becoming interested in it honestly and for the furtherance of his own good or interest — then it shall render his testi=mony inadmissable —

If one of the parties for fear that the witness witness will not attend and knowing that his ~~life will not recompence him~~ fees will not recompence him

for examining and knowing as far as can be discovered, honest intentions offer him 1 or 2 dollars a day if he will not fail to come, this will not render him an incompetent witness, tho such persons might have been subpoenaed by the opposite party: because he may expect that his testimony will not operate in favor of the one by whom he is subpoenaed but on the contrary.

VI. The Deft. in the action of account as used in Eng. was ~~do~~ admitted to testify for himself as to all affairs to be adjusted by the ~~arbitrators~~ auditors and the necessity of the case perhaps required it—

But in Con. this is a statute regulation as applicable to the case of Book-debt: the parties being allowed to testify both as to the delivery of the articles and the price agreed upon &c—

So also in the case of a secret assault & battery a Con. stat. has provided that the person assaulted may forthwith enter complaint and showing his wounds testify as to the facts in a civil suit and recover—

A. But the Defts bail cannot be a witness for him, because it is ~~for~~ of the Defts own act that he is made interested, but he may be exchanged for other bail and then admitted as a witness—

# Evidence –

**D.** Before the case of Bent and Baker it was a contested point whether whether a servant could be a witness when his master sued for an injury done to such servant per quod &c. The servant in this case is interested in the question only and before the case of Bent and Baker the decisions were contradictory — But this decision settled the point –

Note I. Generally speaking when property passes by sale thro' many hands: no person thro' whose hands it has thus passed can be a witness in respect to it — Exp. A. sells a house or a tract of land to B. who sells it to C. and D. sues C. for it. in this case neither A. nor B. can be ~~no~~ a witness – because if D. prevails in estabtishing the property to be his, C. may sue A. or B. upon the covenant express or implied that the property when sold was their's – And in many cases of quit claim deeds the rule will also obtain — But if the quit claim deed be given under such circumstances as to ~~thro~~ show the transaction to be a mere bargain of hazard – & such as raise no covenant that the land is the vendor's, there is no interest direct or consequential, then such vendors may be witnesses — But there is much contention among lawyers, as to the question whether the vendee tho' by a quit claim may not in every case sue the vendor and recover the consideration money Mr Rowe

# Evidence.

thinks that the contract was entered into by the parties under a full knowledge of the disputed claims of a proportionate price were given that the vendee cannot recover anything from the vendor.

**VII.** It has been a litigated question in Con. & will be when the process of foreign attachment is known whether the garnishee when served with the writ of Sci. fa. can come into court and as a witness testify that he is not agent - factor - Attorney - trustee - or debtor to the absconding debtor? against the interest of the plt
The Con. courts have decided that it is competent for him to do it -

**VIII.** The courts of Cha. recognize the same rules in regard to the competency or incompetency of witnesses as obtain at law, except in regard to the testimony of the Deft. himself or of the Pltf. when appealed to -

For it is a rule that the Pltf. may always appeal to the Defts. except where the acknowlagement of the fact would criminate him & mutatis mutandis.

But the answer of the respondent is not necessarily is not necessarily conclusive - After having appealed to him the Pltf. may disprove his answer by other testimony for the Deft. is not in such cases so far the witness of the Pltf. as that his testimony may not be impeached by him.

Nor is he so far ~~the other witness~~ like other

witnesses or that if he do not chuse to speak he will be in con=tempt and punished by the court — But if he will not an=swer the petition shall be taken pro confesso.

In Eng. the party ~~appealed to~~ has a right to always answer upon the party appealed to particularly answer under oath but not else oath — But in Con. ~~this is not generally the case~~ — and this difference obtains, Viz. that if the Deft answers under oath it is in Con. conclusive —

**IX.** A person equally interested on both sides of the question is a good witness —

**II.** It is a principle that the verdict found by the Jury in a criminal prosecution shall never be given in evidence or plead in a civil suit for the same act —

It is a principle that the quantum of interest is never a subject to be inquired into by the court — it is suf=ficient that the witness be interested directly or consequent=ly in the event and in a pecuniary point of view and he is incompetent — If B. be tenant in tail of an estate in ~~sem~~ remainde in fee to A. — A has a valuable interest in the reversion. If a suit be instituted relative to this prop=erty by B. A. shall not be a witness, tho' his reversion in common ~~w~~ be not worth 10 cents for the tail may be docked by B. and the possibility may be also that B.'s heirs

capable of taking may never become extinct and yet his son and presumptive heir to this estate is a good ~~witness~~ and competent witness for he doth take as purchaser and has no interest.

F. But if A. and B. both severally claim a right of commonage in Blackacre and A. sues for a disturbance of his right B. shall not be a witness because their several rights are depending on the same principals & the establishment of the right of one is the establishment of the right of the other—

E. It is a little surprising that such a case as the following should have been questioned — Can the Sheriffs deputy be a witness when the sheriff as such is sued for an escape from such deputy? — If such deputy can screen ~~himself from~~ the sheriff by his testimony he absolves himself from liability; if the Sheriff fails he can come upon his deputy — The deputy is then interested and as such should be excluded — But whether he is excluded or not is as yet an unsettled question—

Note I. So also in the case of a suit brought against the master for the negligence of his servant in driving his team his servant shall not be a witness — For if the master is liable the servant is also liable to him. But if he show a release from the master he may be admitted for them

3 Lev. 426. 7.
5 Mod. 75 —

he has only an interest in the question of the master's liability.

## Of Persons infamous.

An infamous person is incompetent to be a witness.

An infamous person is one who has been guilty of ~~the~~ and actually convicted of the Crimen falsi.

The Crimen falsi as used here is not confined to the commission of perjury as some have supposed. It is the commission of every crime which goes directly to impeach the integrity of the person, his character as a man of ~~veac~~ veracity.

It is true that the commission of any crime will affect a man's character. But in order to exclude a man from testifying as a witness it must be such a ~~witness~~ crime as goes directly to impeach his integrity as the crimes of theft, perjury, forgery &c. But there are crimes the commission of which will not render a man's contracts suspected as that of fornication assault & battery &c.

An idea once prevailed that the punishment of the crime committed was the criterion, i.e. if the punishment were ~~which~~ what is called infamous the witness shall not be suffered to testify. But this idea is now exploded.

# Evidence.

The King of Eng. has power by the constitution of that nation to restore an infamous witness to competency by granting him a pardon — The idea that a pardon in this country and indeed in that ought to restore to competency is rank nonsense — The granting of a pardon is a mere act of mercy — If it proceeded on the ground that the criminal was not guilty of the crime it would be perfectly consistent that it should restore to competency: but then it would be an exercise of power of all others the most arbitrary and dangerous — If after a Jury of 12 men acting under the influence of an oath and under the direction of a court had found a person guilty of a crime the chief magistrate had the power at one breath to say he was not. he would be far higher than the laws. But by what other hypothesis can the stain upon a man's character consequent upon such a conviction be said to be wiped away — and himself restored to any kind of confidence in the ~~eyes and~~ pure eye of a Court of Justice? But it is conceded that no pardon is granted on the supposition that the convict is not guilty — But it is a mere act of grace of favor and can this be said to regenerate him?

In case that a witness is excluded because of his infamy it is indispensably requisite to produce the record

# Evidence -

(or a copy of it) of his conviction no other evidence will be al=lowed.

But if the record can be ~~be~~ proved to be lost - other evidence will be admitted.

In all cases it is a rule that the best evidence which the nature of the case will admit of shall be had - from the nature of the case if the witness be in remains there must be a record of it -

But the superior courts have permitted witnesses to testify notwithstanding the production of records of their conviction - and of convictions of the crimen falsi of crimes which go directly to impeach their integrity - the cases were of the following discription: Viz: the persons brought in to testify had when young and many years before been con=victed of this crime - but as it appeared by all their neighbours who were introduced as witnesses for this pur=pose that they had ~~had~~ lived lives irreprochable ever since - And their conduct having for many years been fair & honourable in all respects it removed the presumption founded on the record - But these will be very rare -

When a stat: prescribes a mode in which an offence shall be punished and among other items pro=vides that the perpetrator shall not be a witness in

T. Ra. 369.
1 Salk. 69 pl. 1.
Cent. 349.

Salk. 690.

any court of Justice this incompetency cannot be removed by a subsequent pardon granted by the King. A pardon in Eng. can restore a witness to competency in no other case than where the disability is the sitent result of a previous con= =viction of the crime – But when the incompetency is the result of an express stat. provision it cannot be removed by a pardon. In the one case the disability is the sitent concomitant of the Judgment in the latter it is that which constitutes part of the terms of the Judgment which decrees among other things that "the criminal shall never be a witness in a court &c –

B.B. Notwithstanding the rule before laid down to determine what is the crimen falsi, there has been one species of crime which has been decided to ~~prove~~ pro= =duce the consequence of it, which at first ~~sight~~ view we should not conceive to be this offence – Viz. what is known in the law by the appellation of common barretry. This is the crime of stirring up law suits promoting quar= =rels and in a word the setting a neighbourhood by the ears – This crime according the current of authorities is a species of the Crimen falsi.

# Evidence.

## Of Atheists Infants &c.

No person in society professing himself to be an atheist can be admitted in any court of Justice. And this however honest he may be in his principles (if an atheist can be honest) because such principles disallow the superior obligation of an oath; for on this very ground are all stories of hearsay evidence excluded Viz. because not given under the sanction of an oath —

Universalism it is contended ought to bar a person from swearing in a court of Justice — Or atleast one species of them; who profess it whose creed is that there is no future state of rewards and punishments and of course who will not feel in so high a degree the obligation of an oath — This question has been made in Maryland but Mr. Reeve does not know how it was decided —— One instance also has occured in the state of N. York where a respectable justice of the peace excluded a witness on that ground.

It has been much contended in Eng. that neither aliens nor villains should be permitted to testify — But the law is now settled that they may —

It was formerly the law all over Europe that no infidel or pagan should be a witness and that none but Christians & Jews should be — This rule arose from the prem=

# Evidence –

liar mode practised in swearing witnesses Viz. on the old or new testament — This law was clearly and unequivocally settled thus so late as Coke's time – 20. B. Salmon case Cro Eliz. 6. 2 Raw. 434. –

But since then it has been settled that all persons believing in a God or Gods and a future state of rewards and punishments are good witnesses and are to be sworn according to their own mode — Thus an Indian will swear by the great spirit – A Hindoo takes hold of the Bramin's heel – and the Abyssinian pagan taking hold of his own hair will swear by the hairy head of his mother — And it is of importance that each one swear by his own creed and ancient custom of his own religion otherwise the oath cannot by such person be considered as binding upon him –

The presumption in this country is however that all are good christians and shall be sworn with the uplifted hand — by the ever living God –

Persons who from defect of understanding do not understand the nature of an oath are incompetent witnesses – As Idiots — Lunatics — Infants &c –

With respect to infants no precise rule is framed fixing the time at which they shall or shall not be deemed to have a sufficient discretion —

No objection is ever recorded to have been made

Stro 700—

# Evidence –

to them on the ground of infancy if they were as old as 12 or 13 years, but they have been admitted as young as from 9 to 12.

If over 12 they appear to be admitted of course; from that age the court examines them in order to discover their knowledge in this particular – and if they are found discreet and aware of the solemnity of the occasion they are sworn and permitted to testify –

And tho' such children be under the age of 9 years yet if upon examination by the court they be found to feel and to know the peculiar importance of the ceremony Mr. Bower apprehends that they may be admitted and sworn – yet there does not appear to be a case decided in which the court has allowed it –

But tho' not sworn children have been frequently admitted simply to retale their story and ~~&~~ this perhaps is the only instance wherein a simple story without oath has been admitted as evidence –

According to the Eng. law Quakers are not permitted to ~~testify~~ in criminal cases – In civil ~~cases~~ ~~provided by stat.~~ provision by stat. is made for them to testify according to the solemnities of their own creed but in criminal cases ~~but in criminal cases~~ they are excluded unless they will swear – which their principles forbid –

Doug. 206-

# Evidence –

While we contemplate says Mr Reeve the beauty & symmetry of the Eng. Criminal law we cannot but feel a degree of mortification in discovering this blemish, it is as putrid flies in a sweet & fragrant ointment –

## Desultory Rules – &c –

I. The best evidence which the nature of the case will admit of must always be had –

By this rule is meant that the best that the party can obtain from the nature of that particular case shall be adduced – Ex. If A. contracts with B. to deliver him ten barrels of cider the contract being in writing and A. fails of delivering the cider a suit being commenced – B. must introduce the writing or fail in the action, for the writing is the best evidence that the nature of the case will admit of —— Hence also if there be subscribing witnesses to a note or other writing they only shall be admitted as the witnesses to the contract for they are the best evidence the nature of the case will admit of –

This rule is founded in the strictest policy & good sense – The writing in the one instance and the subscribing witnesses in the other are best calculated to

develope the true intent of the contract — If for instance B. could support his action against A. by introducing pard witnesses to the contract they may not know the whole of it: it may be that the writing will show the cider was to be delivered only on the performance of a condition precedent which article in the contract they may not have heard or having heard may have forgotten — In the other case the note may have been delivered as an escrow to take effect on the happening of a contingency:- tho' fifty witnesses may have been present yet the subscribing witnesses who were called for that purpose are the only ones who may know this secret article of the contract -

And if the Plfff. does not introduce the best evidence the nature of the particular case may admit of none shall be heard and he shall become nonsuit -

Unless however he show that the subscribing witnesses are dead; or the contract for cider (proving the contents of the writing) be lost or destroyed -

There are cases however where the Plfff. will not necessarily become nonsuit: but his not producing the best evidence which the nature of the evidence will admit of will only operate as a circumstance of great weight against him upon the Jury -

## Evidence –

In the case of a dispute about the title to land if the party do not produce the deed or the record of it, or prove it destroyed he shall produce none whatever and must be cast nonsuit – So if there be a claim founded on a judgment the record or a copy must be produced or none and the pltff. will become non suit –

But on the other hand if there be an Assault & Battery seen by persons a few feet off who must necessarily have known all about it and on the trial the Pltff. introduces the which were ten rods off and not those who stood nearer those introduced must indeed be ~~sufficient to testify~~ suffered to testify, but as they are not the best which the circumstances of the case admits of – it will be inferred unless this presumption be rebutted that the other witnesses were kept back because they knew of facts militating against the Pltff. and the presumption will have great weight with the Jury in the argument –

## III. Irrelevant Testimony –

This kind of testimony shall always be excluded by the court – By irrelevant testimony is meant such as does not go at all to prove the point in issue – As if on a

## Remarks

# Evidence –

plea of Usury the Deft. introduces proofs of extortion if the Deft. were to prove the Pltf. guilty of extortion it might be of great weight with the Jury in determining the contract usurious. But it is improper that the Jury should derive from the question any such prejudice & as extortion is not usury any evidence going to prove extortion is excluded as irrelevant and not proving the issue –

## III. Hearsay Testimony –

This sort of testimony is not regularly admissable. By this rule is meant merely that a witness shall not be suffered to relate in Court what he may have heard another person say But to this rule there are Exceptions –

1st After a witness has testified the opposite party may introduce evidence to show that out of court and on other occasions such witnesses told a different story; this is for the purpose of impeaching his evidence and to destroy his credibility –

But here it may be observed that a party can never at law impeach his own witness directly in any way – If a man's witness do not swear as he thought he would and as the truth may be, still he shall never be permitted

## Remarks.

# Evidence –

to prove that the witness is not a credable person –

The Pltff. may appeal in Cha. to the Deffts conscience but is ~~not~~ so far this does not so far make the Deft. his witness as to preclude him (the Pltff.) from ~~testi~~ impeaching his testimony for the Deft. is not compelled to speak –

Upon the same principle it is that if the witness of one of the parties be impeached such party may introduce hearsay evidence in order to corroborate the testimony given in by proving the good character of the witness &c.

But this kind of evidence is never allowed except when an attempt has already been made to impeach the witness –

2– A second instance where this kind of evidence may be introduced is when pltff or the Deft. out of Court made <u>confessions</u>.

Indeed the confessions of the party are the best evidence in the world: taken with this qualification – Whenever a man out of court ~~a man~~ confesses himself guilty of a particular crime, using the technical term, the confession shall be of no avail against him unless he confess and relate facts: for how does he know what particular facts are necessary in order to constitute the crime? If for instance a witness confess himself in a particular ~~crime~~ instance to have been guilty of <u>perjury</u> or forgery &c

## Remarks.

how does he know that the particular acts he may have commit=ted constitute that crime? But his confession as to facts is good and conclusive –

When upon suspicion a man is taken before a ma=gistrate to be examined as to the fact – the court ought prop=erly to have taken down in writing his whole confession and indeed all the proceedings on the case – The person suspected is not obliged in such case to answer any interrogatories but if he make confessions of guilt and they be taken down in writing the proof is better than any out door confessions and being the best will exclude all other ~~transactions~~ con=fessions –

When many are concerned in the commission of an act the confession of one will not be evidence against the others – If the question be as to the breaking and enter=ing the house of J. S. – and A. B. & C. be the defts. the confes=sion of A. that he entered and that B. & C. were with him will be conclusive as to A. and will be conclusive proof that he being accompained by B. & C. committed the act. But as to B. & C. it is not allowed to be any proof whatever. However A's name may be struck out of the ~~list~~ record and he being sworn as a witness shall be allowed to tes=tify against B. & C.

# Remarks.

1 Vern. 58.
3 Mod. 259.

# Evidence –

But except in Cha – what a party confesses by the plea=
=dings shall never be made use of against him in a subsequent
suit –

What is confessed by the pleadings in Cha. shall
in every case be evidence against him for the answers are re=
=ciprocally given in under oath –

Yet the confession of the Guardian who necessari=
=ly answers for the infant – or that of a trustee who answers
for the cestuy que trust shall not on subsequent occasions
be evidence against such infant or cestuy que trust –

3. The most distinguished and important exception to
the general rule in this country is thirdly – the admission of hear
say evidence in respect to the boundaries of land – The stake
or stones or precise boundaries of tracts of land are frequ=
=ently known only by the surveyor or first settlers of the
country – and if they be dead what they have been heard to
say in relation to these boundaries may be given in evidence
and to have such influence as the Jury may be inclined to
allow –

4. That a man is dead is not to be proved by the evi=
=dence of a man who saw him die but by general report –
And this general reputation of his death is the common evi=
=dence – If therefore a man who saw him die be introduced as

a witness he cannot attest to this fact but only that such was the reputation of the fact - of the last paragraph I doubt

V. The pedigree of a man may be proved by this hearsay evidence — But this is not always allowed -

A. This hearsay evidence is generally the only mode of impeaching the testimony of a witness already given in: for it is never allowed for other witnesses to come in and swear that of their own knowledge the witness in question had been guilty of the commission of a particular fact or crime: — No witness shall be thus accused of one or more particular crimes - But his general character, forthwith only, may be sworn to i.e. what character the witness has acquired in the neighbourhood - and not whether the deponent ~~thinks~~ thinks him himself worthy.

But when a party to a suit, by proceedings in it or by the action itself, puts his own character in issue, then the opposite party may go into ~~proof~~ the proof of particular facts in order to prove his turpitude - As when a person brings an action of slander to recover damages for being called a thief, in respect to a particular transaction, here the deft. may go into the proof of other particular facts in order to lessen the damages or to prove that the Pltff. received none -

So where a man enters into a contract with his mistress to pay her a certain sum annually as a compensation for the enjoyment of her - Such a contract is at law

Doug. 206.

# Evidence –

void – But in Cha. if it can be proved on the part of the girl that the Deft. seduced her, and that she was not a common prostitute before, she may recover – Now therefore the Deft in Cha. may go into the proof of particular facts criminating her in order to preclude her from a recovery –

**B.** According to the laws of Con. there is no need of introducing the subscribing witnesses to a deed – if proof can be introduced of a confession of the party that he signed the instrument – But however reasonable this rule may seem it does not obtain in Eng. For according to the Eng law if the instrument be disputed in Court, the Plfff. must introduce the subscribing witnesses, if to be found, for any out-door confessions will not be suffered to be proved –

**IV.** What is said by one <u>in articulo mortis</u>, it is said by elementary writers is to be admitted and believed as evidence –

This proposition does not seem to be denied and there is a case in the 3 Burr. 1244 recognizing it ——

But this rule embraces only such assertions as are made by a man of sound mind – seriously and in contemplation of death –

When such declarations are made they are admitted as evidence – under precisely the same circum-

=stances as are admitted the declarations made under oath of a man now dead—

V. It has been made a question whether a mother could be admitted to ~~of~~ as a witness to prove whether her son is or is not a bastard child—

It is a maxim that no person shall be compelled as a witness to criminate himself—

But the rule that no one shall be permitted to tes=
=tify wherein ~~in the case~~ such person might ~~be~~ criminate himself, has been long since exploded— The question therefore may be considered settled as Mr Reeve thinks, that if the mother chuse she may as a witness testify in the case: but that she shall not be compelled to do it—

VI. If the title of black acre be disputed a naked trustee may be a witness — But suppose such naked trustee be on the record, party to the suit? Mr Reeve conceives that if it can be proved that altho' party to the suit he is not interested he may be a witness. As if this trustee for the use of the cestuy que trust, & hung in=demnified in regard to his ~~suit~~ liability for costs, being ejectment:— in such case Mr Reeve apprehends he may be a witness — So also where a person (whose right it may be) sues on the bond given by an administrator to the judge of Probate in his (the judge of probate's) name and having indemni:

=fied such Judge of Probate, against his liability he may be intro=
=duced as a witness — Raud. 358 —

## VII. Of the number of Witnesses —

The Eng. and the Civil law: are different as they respect the number of witnesses requisite to prove a fact —

The civil law requires for this purpose two witnes=
=ses — By the Eng. law no particular number is made necessary as a standing rule — One witness one deposition or proof pre=
=sumed by circumstances may in many cases be sufficient — There is no certain rule but the evidence must be such as will convince the Jury —

The first deviation of the Eng. law from the rule of the civil was occasioned by the supposition that the Jury who were all chosen from the neighbourhood, of their own private knowledge were acquainted in a good degree with the facts in the case — Carth. 144. Show. 158. Ed Ray. 220 —

But atth'o in general this matter be left entirely with the Jury yet there are cases wherein the law has pe=
=remtorily required a certain number of Witnesses —

The civil law rule obtains in some measure in all cases arising in the courts of Ch. i.e. when the Deft. is admitted to his oath: For there is no instance in which a

2 Vern. 854 –
2 Ham. 428 –

## Evidence –

decision has been had in Cha. upon the evidence of one witness only in opposition to the testimony of the Deft. for this is but one oath, off set against an other –

But two living witnesses are not absolutely required to establish a fact these men, for any corroborating circumstances may be introduced to turn the cause –

So in the case of perjury in the courts of law there must be more than one witness in order to convict and for the same reason as is mentioned above –

In respect to treason the offence is hardly known in the U. S.: – But it is an offence well known in Eng. And according to their law one witness is not sufficient to convict a man of this enormous crime – but one witness to one overt act and an other witness to an other overt act is sufficient – When the offence of treason shall be known thro' the U. S. this Eng. rule may or may not be adopted: There seems to be no conclusive reason why the rule should be so.

By a Lon. stat. it is required that all capital cases be proved by two witnesses; ~~or one and~~ or some other evidence equivalent to ~~one~~ two – Strong circumstances therefore together with one witness is as much as the law requires ~~or circumstances only equivalent~~ – equal to two

## VIII. Of Depositions –

# Evidence.

It is a general rule in Eng. obtaining in the courts of law that parol evidence must be delivered in viva voce and not by way of deposition.

But in civil actions ~~they~~ there are exceptions to this rule in which cases depositions are permitted to be read. As when sickness or other cause renders it dangerous or impossible for the witness to attend the court.

But it would seem a matter of doubt whether even in such a case a deposition ~~would be read~~ could be introduced without the consent of the parties. In cases of this sort the court usually recommends to both parties that they agree to introduce the deposition. And such is the respect paid by the Bar, to an Eng. court that it may be, no question has ever been made. Elementary writers say that if this agreement be not made the cause will be continued or advantage may be taken by the Pltf. of a stat. authorizing the appointment of Commissioners to take the deposition in ~~perpetuam memoriam~~ ~~to preserve~~ But to this is added a proviso.

It is not uncommon for depositions taken in Chan. to be improved in Courts of law as evidence.

The Courts of Chan. proceed altogether in establishing facts by depositions. not only the answers of Pltf. & Deft. are written and under oath but if any other witness be

# Evidence –

adduced, his evidence shall be taken down in writing and if matters of fact be disputed then, a case is made ~~ad~~ and to=gether with depositions (if they be necessary) is sent to be tried ~~at law~~ by the Jury –

The law is otherwise in Con. Both the courts of Cha. and law use depositions as the case requires and as to matters of fact the ~~Ch~~ court of Cha. either decide them, or appoint commissioners who decide for them –

In criminal cases the laws of Eng. and Con. are the same in regard to the exclusion of depositions –

It is an invariable rule, that no conviction of a crime shall be had on a deposition – and indeed that none shall be used in criminal cases – And if an important witness be absent the cause will be put off until he be obtained ~~tho~~ tho' he be at the ends of the earth –

Note – In common cases the public will be at the expense of summoning the Defts witness for him if his attorney or coun=sel will say upon his honour that they think it impor=tant for the Deft. that such witnesses be present; and this more particularly if the Deft. be poor.

The modes of taking depositions in different countries are different – In some of the United States com=missioners are appointed for this purpose and in others

# Evidence –

Justices are empowered to do it –

The Con. stat. regulating this affair allows a party to improve a ~~party~~ deposition taken before a Justice of the peace – A practice has sprep in of suffering depositions taken by Justices of the peace in states (as Virginia &c) where Justices are not authorized to take them to be improved; and this ~~decision~~ decision has been ratified by a decision of the court – This decission was rather founded on immemorial usage than strong reasons ~~for~~ for it –

According to the Con. law no attorney and neither of the parties may draft the deposition – Nor indeed are any allowed to do it but either the deponent himself or the Magistrate ~~if the deponent genuine or man not an alien~~ ~~in the cases of well known~~ before whom it is taken – And such Justice may not let the deposition go out of his hands without being sealed unless he deliver it himself into court –

Depositions are not better evidence than such as is delivered viva voce in Court; they are not even so good A deposition properly speaking is parol evidence – It is but evidence delivered (before a person authorized) viva voce and written down or written by the Deponent being in its nature altogether parol evidence –

A deposition is always good evidence between the ~~parties~~ same parties in a subsequent suit, if the same dif-

4 Mod. 146.
1 Salk. 279 –

6 Mod. 211.

1 Atk. 445.

# Evidence.

=ficulty obtains of getting the witness himself into court. But it can never be used between one of the parties and a stran=ger or between strangers to the original suit — and by this reason Viz. that such stranger has not the opportunity to cross examine.

A question has been made whether the copy of a deposition can ever be introduced in the stead of the original. When the original has been lost or destroyed, it has been conten=ded that a true copy previously taken of it may be introduced but no decision was had —

But there is a mode which will attain the object and which will be safely pursued on such occasions: this is of moving the court that it be entered on the files of the court and then to cause a copy or exemplification of it to be made ~~in court~~ out under the seal of the Court; This exemplification of it may always be used — for it is then a copy of the files of the court.

There appear to be but three cases in which a depo=sition may incontestibly be used. Viz. when the witness is sick when he is dead and when he is not amenable to the court. They have some sometimes been used however when the wit=ness is no longer to be found —

But tho' a witness be out of the state and no longer amenable to the jurisdiction of the court, a mode may notwith=standing have been provided in the state in which the

# Remarks.

I can subpoena a man from the extremities of the state — If a witness live within 20 miles of the court his deposition cannot be taken and used unless the witness be sick or being about to leave the country — If the witness lives more than 20 miles from the court he may be may subpoend or his deposition may be taken as the party pleases. Stat. 920 —

Notice must be given to the opposite party before you examine a witness — if the party lives within 20 miles of the witness — but if the party does not live within 20 miles but has an attorney within 20 miles and gives notice to his antagonist that he has such attorney that attorney must be ~~summoned~~ notified —

When a witness is wanted a subpoena issues if the witness does not obey the summons a capias will be issued by the court on the person ~~swearing~~ who served the subpoena and tendered the necessary fees swearing that he had served and ~~tendered~~ tendered — He is then brot into court but he is still liable for a contempt tho' he is cleared from a liability for damages. 101. 2 Vern. 700. 1 P.W. 238

# Evidence –

witness at such time is, for taking his deposition – if such be the case this commonlaw rule will not apply – There there are only four cases in which a deposition is allowed to be read at law as Mr H. apprehends – except in the following case which however is much disputed – to wit when at a time subsequent to his deposition is taken the deponent becomes interested – It is concluded that in such case that the deposition ought to be used as that such is analagous to the case of a deponent becoming infamous after the deposition is taken – in which event it is acknowledged that the deposition may be used for the infamous is treated as to this matter as a dead person – But in opposition to this it is said that an interested person is not like like an infamous one in as much as he is still a witness – This reason does not seem sufficient for as to the particular action in which his testimony is wanted, an interested witness like an infamous one is no witness – But the current of authorities seems to be that such deposition must be excluded or excluded.

## IX. Of the Delivery of Deeds – He

This is to be proved by parol evidence: But for this see the pages back –

## X. Parol proof cannot be introduced in cases where

the statute of frauds requires the contract to be in writing — But as to this point and also as to the question how far parol proof may be admitted when the contract is in writing see back —

## VI. Of the mode of compelling witnesses to appear.

In order to compell the appearance of a witness in court that he may testify a writ called a sub poena is served upon him this is a mere summons for him to attend but still the witness is not guilty of a contempt of court tho' he do not come provided the person causing him to be subpoened do not tender him his fees i.e. his mileage and fees for at least one day's attendance at court — And Mr P. apprehends that he is not guilty of a contempt if after the expiration of one day he leave court unless the party for whom he is to testify tender him daily or before hand his fees for attending on court —

But if after a tender made to him as above mentioned and service of the subpoena the witness do not come to court a capias issues on which his body is taken and brought to court. But still if he elude the service and refuse to come he becomes not only liable for the con=

=tempt of court to fine and imprisonment, but also in a civil suit to the party who wanted his testimony, for damages if the case goes against him.

But what ought in such cases to be the rule of dam=ages is matter of difficulty to decide — for who knows ~~what~~ what he might have testified? The Jury however in such case ought to give a pretty heavy sum for smart money.

Yet a witness may have some reasonable expense.

In criminal cases to be more sure of the atten=dance of witnesses a court of inquiry may compell them to give bonds as security that they will appear and tes=tify — or if they will not procure this security they may be committed —

When books papers or other written documents in the possession of a witness are wanted at the trial what is called a sub poena duces tecum is served upon him —

## XIII. Of the privilege of witnesses & Suitors —

Suitors and witnesses have a right to attend Court with=out molestation from any one. They are protected from all arrests or civil process while going to remaining at & returning from Court —

# Evidence –

But the mode of enforcing this privilege is diffe=
=rent in Eng. and Con. The Con. mode is apprehended to be much
the best – According to the Eng. mode if a witness be arre=
=sted on his way to court or while remaining there or while
coming from there, his remedy is to cause himself to
be taken β before ~~some court~~ the court or some proper
authority if the court be not in session and prove that he
was a witness upon which (what is in the Eng books is cal=
=led) a writ of supersedeas is granted to him and this stays
all proceeding against him – while he is going to, atten=
=ding at, or returning from Court –

But in order to derive full benefit from the
writ of supersedeas, it is necessary that the witness have
honesty – he must not attend at the court an unreasonable
length of time after he is wanted no more – and in going
to or from there he may not go a very circuitous route –

The supersedeas or as it is called in Con. the protection
will have a retrospective effect, because the witness is entitled
to it when he first sets out – and if the subpoena be ser=
=ved upon him with in a reasonable time before the set=
=ting of the Court, he is entitled to it from the time such service
being made –

As it is essential to the proper administration

# Remarks.

There is nothing you hear more often in Courts than that affirmative testimony ~~ought~~ always out weighs negative and yet there is nothing more absurd — For example one man comes into court and ~~swears~~ swears affirmatively that A. the last sunday came into church and shot at the parson and the whole congregation besides come and swear negatively that they ~~say~~ saw nothing of the kind ——

Bank. Centurion. Brown. 15. T. Ra. 181. 2 Mod 181. 2 Roll 270—6 17 Vin. 513. 4 Com. 274. 2 Bl. R. 1113 1190. 1 Salk. 544 —

# Evidence –

of Justice every power court has power to grant this writ of protection. ~~Before the witness sets out~~ –

In Con. the mode is if required, to grant out this writ of protection before the witness sets out –

An important question has arisen in Con. whether if the sheriff arrest the witness on an other suit, the witness having shown him at the time, his protection he will be guilty of false imprisonment if on the face of it the protection were good – Tho' according to the Eng. mode of proceeding it would not be as supposed there, that when arrested the witness had not his protection and the sheriff ought not on his mere word, to let the witness go –

And it would not be reasonable in this case to subject the sheriff by relation to an action – tho' it so far operates as that the witness is discharged –

But if the witness had already obtained his supersedias and had shown it to the sheriff and the sheriff notwithstanding arrest him he is liable to an action of false imprisonment and to arrest a man under such circumstances is a contempt of court.

The former mode in Eng. of taking advantage of this privilege was for the person arrested to sue out his supersedias – 14 Vin 513. 14. 4 Com. 274. 2 Bl. 1113. 1190. 3 Salk. 544 –

# Evidence –

But the more modern way is to cause himself to be brought to court – and then by a summary mode to be discharged –

In the case in Lou. wherein it was contended that atho' the writ of protection was shown that yet the sheriff was not liable ~~for~~ to an action for false imprisonment reliance was placed upon the Eng. decisions, not adver=ting to the circumstance that atho' the person was entitled to his protection yet that he had it not to show the she=iff, who could not safely trust the mere assertion of the witness – and also reliance was had on the fact that if the person arrested procure bail he shall not even pro=cure a discharge – the arrest will be good and the ~~arrest~~ bail will be holden — But in the latter case if the person has procured bail nothing more is reques=ted, the witness is not prevented from attending the court –

It was likewise urged that the sheriff could not be liable because in this case the court had not juridic=tion over the cause — But this objection was overruled and it was decided that if on the face of the writ it did not appear but that the court had juridic=tion, whether it had or not it should be presumed

# Evidence.

that it had —

The writ of protection extends not only to the person of the witness but also to his clothes and trunk —

**VIII.** The mode of examining witnesses as a matter of practice, is, for the party whose witness he is, to examine him first, untill until he has finished and then for the opposite party to do it —

Whoever in the course of pleading takes the affirmative of a question (whether it be the pltff. by his declaration or the deft by his plea) such party must proceed first and prove it — That which is conceded by the pleadings not needing proof — It is a rule that affirmative testimony generally can negative testimony But this rule is to be taken subject to the influence of commonsense — If one witness swears that on sunday during the performance of divine worship, two lawyers came into the church and plead a case: if the rest of the congregation deny the fact the negative must surely must be considered as proved —

## Of Written Testimony.

Written evidence may be divided into three classes

# Remarks.

10 Co. 92. 2o.
Lit. 209. 2no.
Gam. 7. 2d. Ky.
159. 146

# Evidence –

Viz. ~~records spec~~ records – specialties – and unsealed writings –

I. Records strictly speaking are nothing more than the acts of a legislature recorded in their rolls – and the proceedings of ~~a~~ and judgment of a court of records or of men acting pro hac vice as a court of record –

Records of Birthes marages Deeds ~~an~~ &c are not properly records but things recorded however in conformity to common parlance all shall be treated of under the general name of Records –

A record is of itself a conclusive proof of what it imports to prove –

But generally speaking the records themselves cannot be produced, in which case the ~~copy~~ copies of them are evidence –

There is a rule that the best evidence which the nature of the case allows of must be produced – And the records themselves are no doubt the best evidence – But it would be wholly inconvenient to have the records themselves removed about from place to place – this indeed would in many ~~cases~~ cases be impossible for they may be called for in different parts of the union at the same time: hence the best evidence

## Remarks

If you wish to make use of a law of any other state in a court of Connecticut you must prove the existence of such law for the judges cannot be supposed to know it.

the nature of the case allows of it a copy of the record properly taken – All therefore which is required in such case is for the proper officer to wit the prothonotary, or in his absence or death the Judge to frame a true copy and as such person has already taken an office oath this is sufficient authentication of it –

If the prothonotary whose proper business it is be sick or absent and the Judge also who is next regularly to be called upon – Any person in whose possession the record happen to be may frame the copy. But in this case a mere certificate that it is a true copy is not sufficient for such person has not taken an office oath – He must therefore go before a proper authority and depositionwise make oath that he has examined the records and that this is a true copy.

And when a copy is thus taken it must be ~~a whole copy of the case~~ a copy of the whole of the ~~case~~ record of the case for a mere extract is not sufficient however long the record may be –

But in Eng. when ~~th~~ ~~a copy~~ copy of the record is required the judge of the court merely affixes the seal of the court to the copy and this ~~when~~ without a certificate from him is sufficient: for in stiff the seal imports that

10 Mod. 16.
Stra. 446.

the copy is a true one.

The records of the Legislature are generally speaking the statute books — These with a certificate that the editor or publisher has been authorized by the Legislature to do it are sufficient proof — And even the laws in other published in a newspaper if accompanied by such a certificate are sufficient proof — But a newspaper or even a statute book without such accompanying certificate is no proof —

General statutes however need not be read for they are always supposed to be deposited in the heads of the judges even before they are ~~read at all~~ published at all —

But private statutes the court is not supposed to know anything about — These therefore according to the Eng law must be pleaded or counted upon specially — But in Con. may be given in evidence —

Private statutes stand on a different footing as to the mode of proof — These are not usually inserted in the stat. books; but if they be the stat. books are not good proof. They can be proved in no way but by Office copy under the great seal and signed by the secretary or other proper officer —

The laws of other countries or state are not supposed to be known by the judges therefore the law books of such other states should be produced. And if

# Evidence -

there can not readily be produced the assertion of a Judge or prac=ticing attorney of that state should be proper addduced - Other private persons have been called upon to testify as to the laws of such country; but there is danger in trusting to peo=ple whose business it is not particularly to know its laws

The Court ought not from its own particular knowledge to determine what the law of an other state is, is with=out some other evidence of it -

As if an inhabitant of the state of Brook should sue in Con. upon a note executed in N.Y. being of course N.Y. interest which is seven percent - altho' the Judge of his own private knowledge were to know that in N.Y. that interest was at seven per cent yet he ought not to give judgment for seven per cent without some oth=er evidence to prove that such was the interest.

The general com. law of the land cannot be proved because the Court know it -

But particular customs are to be proved averred and proved and this frequently by parol -

General histories in respect to many things are good evidence -

Historians - may differ in many things - but as to many general facts in which historians are

Salk 281.

2 Roll 686
yelw. 34—

# Evidence –

agreed, no histories may be introduced to prove –

But no private right can be determined by such evidence — i.e. histories shall not be introduced to prove that a particula manor belonged at a particular period to the family of the Chathams &c –

Heralds' book may be admitted in Eng. to prove the pedigree of a family – And this may also be proved by parol tra=ray evidence –

Almanacks may likewise be admitted to prove certain facts as the day of the week when the month com=menced when the moon rose at a particular time &c.

A custom has sometimes arisen for parents to record in almanacks and bibles the births marriage or death of their children with a rempulous accuracy in such case these may as records be admitted for proof.

And altho the law require that things be re=corded yet if they be not they may be proved by this method or even by parol – But if it can be proved that such birth or marriage was agreeably to law, re=corded then no other proof is admissable –

There are statutes requiring that certain things be in writing, as conveyances of land and in such case no other proof whatever shall be admitted: But not

Cowth. 179.
5 Mod. 386.

3 Burr. 1240.

so of births or marriages required to be recorded; if no record they may if not recorded ~~they may~~ still be proved: but in respect to conveyances no title passes unless by writing.

Note I. When a prior verdict in a case between the same parties and relative to the same point but not embracing the same subject matter has been had, it not being a bar to the subsequent suit may be given in evidence of the facts & facts found in the case. Such verdict however is not con=clusive, it is even weak and only goes to make up the mass of testimony in the case. But as between strangers it is no=thing at all; the parties must be not only the same on the re=cord but the same in reality also — As where A. had possession of 10 acres of land which B. claims B. sued for 5 of the 10. The verdict may afterwards be introduced in a subsequent suit brought by B. against A. for the other five all the 10 acres being claimed as holden by virtue of the same title —

There are cases in which certain things as deeds &c must be recorded or is required by stat. — And yet the copy of the record not being the best evidence that the nature of the case would admit of will be excluded —

Such is necessarily the law the genuineness of the hand writing may be disputed and when the handwriting

of the witnesses or of the grantor is disputed the deed itself should be produced.

It is not an universal rule however that the deed itself must be produced: for the case may be that the person claiming under the deed never had possession of it as in the case often met of the claimant of Dower in which case as the this is supposed to have the title deeds a copy of the records will answer — So also in all cases where when the deed may be proved to be destroyed or lost a copy of the record will do But unless some such fact be proved a person claiming title must always by the Eng. law make it out by the title deeds —

But there is a remarkable difference between the Con. & Eng. law on this subject arising from the difference in the habits and customs of the two countries —

When land is conveyed in Con. the title deeds are never handed over to the grantee as is practised in Eng. thus the writ a necessity while this practice obtains when a person sues or is sued by making out a title in himself by copies of the record: But the original deeds are required if within the reach of the person claiming title —

This is really a very unfortunate custom in as much as it may lead to many knavish practices for it is evident that a man may counterfeit a number

* If the subscribing witnesses be dead other persons who saw the transaction may be admitted —

# Evidence

of deeds having them ante dated and the copies of them when recorded — thus make out a complete title in himself

## Of Specialties —

A record is proof of itself but every deed ordinarily requi=ring wants proof i.e. it wants i.e. it wants proof that it was executed and delivered —

Proof of the execution and delivery of a deed ~~and~~ must from the nature of the case be by parol —

The subscribing witnesses are the proper persons to prove this for they are the best evidence the case admits of —

If the subscribing witnesses become infamous and probably if they become interested or are out of the state proof of the hand writing ~~must~~ may be admitted: From proof of this the in=ference will be that the deed was executed and delivered in their presence —

If the subscribing witnesses ~~become infamous~~ be out of the state and not amenable to the juridic=tion of the court their depositions must if possible be ob=tained and these severally are the best evidence of which the ~~case~~ nature of the case allows. ~~of~~

But there are two cases in which the evi=

+

# Evidence -

=dence of the subscribing witnesses need not be obtained Viz.
I. When the grantor or obligor has conferred the execu=tion and delivery of the deed, and II. When the specialty is forty years old -

It is laid down as a rule that all the subscribing witnesses or any other evidence is allowed to do, is merely to prove the simple fact of the execution and delivery to the grantee or obligee - And that it can be except by deed that any conditions were tacked to the delivery -

It is allowed however that witnesses may prove that the instrument was not delivered to the grantee be as the deed of the party but that it was delivered to a third person as an escrow - to be delivered over on a condition.

And this rule is the same as applicable to simple contracts in writing as notes of hand not sealed &c -

The law as to the important point is invol=ved in much confusion, the decided cases on the subject on the subject being very contradictory -

It must be acknowledged for the rule is abun=dantly supported that no parol condition can be proved to be annexed to the delivery - except it be that the writing be delivered to a third person as an escrow - but that if the delivery be to the grantee, obligee or prom=

# Evidence –

=ise himself, no parol condition can be proved –

But this consideration here arises tho' the instru=ment be delivered over in point of fact is it in law a de=livery? A. is obliged by an award of arbitrators to deliver to B. a deed of Black acre – & by the same award B. is obliged to deliver to A. a deed of White acre A. comes forward at the time & place appointed for the mutual delivery with his deed of Black acre – but being suspicious that B. does not intend on his part to comply with the award by delivering him his deed of Black acre tenders him under the deed and tells him that it is not his act and deed unless he (B) will deli==ver his deed of white acre – B. takes the deed tendered by A. and then utterly refuses to deliver to A. the deed of White acre – The question now is, whether this delivery is such a delivery in law as to convey the title of Black acre to B. –

Mr Reeve is compelled to confess that the cur==rent of authorities is that this delivery conveys an abso==lute and unconditional title to B. the condition notwith==standing. But ~~however partial opinions it may appear~~ he does not think these decisions to be founded in reason and cannot think them law –

In support of Mr Ro's opinion there is a deci==sion which if it be law goes the whole length of his propo=

=ortion in which the following distinction is taken Viz – if the act required by the grantor be a concurrent act a condition to be presently done without the performance of which the grantor does not mean that the deed shall have effect as his act and deed the delivery shall not be a delivery in law unless this parol condition and concurrent act be performed – But on the other hand, that if the condition, or act be to be performed at a future time then the delivery shall be absolute and the parol condition notwithstanding the title shall pass – Popham in deciding the case alluded to says " if the grantor say to the grantee this is not my act and deed ~~untill~~ until a certain act be done it shall not be considered as an effectual delivery" "But that if the instrument be once delivered as a deed no parol condition shall be annexed to it" – Thus if A. & B. agree in respect to Black acre the purchase of Black acre that A. shall give to B. a deed of it & that B. in consideration of it gave to A. his note of hand for $600 the parties being together for the transaction of the business A. signs the deed and hands it to B. demanding his note. B. takes the deed and refuses to give the note – Now if this delivery be valid in law it is clear that great injustice might be done.

But Mr Reeve with Popham believes this ought not in the eye of the law to be considered as a delivery – If it

Ord. Eliz. 540.
Hyp. not
contra —

# Evidence.

be so considered it is true A. has his remedy in an other action against B. But this perhaps will not furnish the proper satisfaction the land is gone and B. may have become a bankrupt.

Those who oppose the doctrine of Mr Reeve contend that in pages 520 & 884. of the same book Eno. Elix. the doctrine established by the court page 803. is over thrown — but if we still adhere to the distinction before laid down there is nothing on these pages contradictory to it.

But there are cases which in direct terms oppose this doctrine.

Independant of this question it is frequently a matter of doubt what shall amount to a delivery, if the grantor leave the deed on the table and from the whole transaction it appear that it was the intention of the parties that the deed was at the same time meant to be delivered then this shall be construed a sufficient delivery and so of every other case — But when it appears from attending circumstances that this was not the intention and there being no actual delivery it shall not be so considered; and why should not these principles be applied to the case put?

If the loss or distruction of a deed can be proved and there be no record of it, proof may be made of the contents which becomes the best evidence the nature of

the case allows of – so also if the opposite party have the possession of it –

There is a rule in Eng. (by the stat. of Frauds) that in the case of conveyances of land &c no proof can be admitted of it except it be by writing sealed &c – Does not this appear to oppose the foregoing rule? But a distinction is here to be noticed.

But by admitting parol testimony in this case the foregoing rule is not broken in upon: for it is admitted not to prove that A. at a certain time place and manner conveyed to B. a certain tract of land specifying the terms of the contract; but it is admitted to prove that B. had in his possession a certain deed signed sealed &c and which contained a conveyance to him from A. of a certain tract of land – For it is in vain to prove a parol conveyance of a tract of land because the law provides that no title shall pass except it be by writing –

It has always been a matter of much perplexity to ascertain how far the <u>Consideration</u> of a specialty may be inquired into – The following principles however may be gathered from the books – The law has established the rule that in order to render any contract binding there must be some consideration – This rule was framed in order to render the advantages and disadvantages of all agree-

# Evidence –

=ments, as near as might be equal and reciprocal — But when the dealings among men became more intricate and complex and the interests of commerce better understood the idea of setting aside all contracts the benefits of which did not in the event prove strictly reciprocal was relinquished: The reason having ceased, the rule that there must be some consideration was retained — And it was holden at length that any consideration however small was sufficient — This idea once established the quantum of consideration being no longer of importance little regard was had to the sum expressed in the deed and as the mention of this ~~because~~ a mere matter of form it was not supposed that the parties were ever solicitous to put in the precise sum ~~delivered~~ received — Whenever therefore it becomes of importance as it respects third persons to ascertain the precise sum then paid proof may be let in. ~~to show what the amount~~ As between the parties to the instrument no parol proof whatever is admitted to show there was <u>no</u> consideration — But even as between them parol proof may be let in to show what the amount or quantum of that which was received (was) as well as if the rights or interests of some third person were concerned: for as between them and as respects the validity of the instrument it is no matter if it were but a print

P. Cha. 475=

of wine — but as it may affect the interests of a stranger the fact may be of great importance —

The deed of a Dr. to A. if bona fide and for a valuable consideration is good against the Cr., for if an equivalent consideration be pay paid for it. the Dr. is as well able to pay his debt as if he had not sold the land. But the debtor and A. may collude for the purpose of defrauding the Cr. The creditor therefore is permitted to show what the real consideration was — and if there was none at all he may be permitted to show by proof that altho a consideration was expressed to have been received by the debtor there was in fact none at all received — and that the whole transaction was a cheat and fraud upon him —

The consideration expressed in the sealed instruments is nothing more on ordinary occasions than prima facie evidence of what the consideration is — When=ever this sum is an even one as £5. or $5 0. or 5 cents or $500 it is scarcely even presumptive evidence of what it really is. But when on the face of the instrument it is detailed with some minuteness — as if it say in consideration of £10-5-0 — the the presumption becomes stronger — and when it is still more minute as £50-5-3.3/4. then the presumption be=comes quite strong that this was the true sum — But

these presumptions may be rebutted — and tho' the sum ex=
=pressed is 5 cents it may be proved to be $500. and mutatis
mutandis -

## Of Simple Contracts -

Written evidence which is not recorded and not re=
=quired by stat. to be written must be brought into court with
the exception that it be not proved to be lost destroyed or
not attainable as if it be in the hands of ~~an~~ the opposite par
=ty — No copy or exemplification will otherwise ~~do~~ do. for
this is the private property or evidence of property of
the parties -

And of this species of evidence there must accor
=ding to the Eng. rule be a proper in curia But as oyer may
always be had in Con. without proper proper in there never
necessary -

No parol proof can ever be admitted to vary ex=
=plain contradict or contradict a writing in its operation
for it is presumed that the whole ~~writing~~ contract was
reduced to writing -

This rule however is to be taken with many
explanations and qualifications: For which see ~~ante & post~~

# Evidence -

## Of the admission of parol proof to explain or vary a writing.

It still remains a rule that no parol proof shall be admitted when the contract is in writing which does not stand well with it -

But rather than that a writing should fail of effect parol proof may be admitted to explain an ambiguity -

Ambiguities are of two species patent and latent.

A patent ambiguity is where ~~is where~~ a writing on the face of it appears ambiguous -

A latent ambiguity is when the writing itself on the face of it appears sufficiently intelligable but which from some extrinsic fact becomes doubtful -

A rule has been framed, that where the ambiguity is latent, parol proof may be admitted to explain it: - but that if it be patent such evidence shall be excluded.

This rule however has been found too broad. For when in a will the testator devised to seniori filio parol evidence was admitted to show who was meant - The term itself means the oldest boy but as it is frequently used in law latin it means the oldest child whether male or female: it is therefore an equivocal term and a patent

ambiguity –

It is therefore a rule if an equivocal term be used in a writing a parol averment may be made explanatory of it. And the distinction seems to consist in this Viz. that if the patent ambiguity consists in the general construction of the instrument, parol evidence shall not be admitted to explain it and the contract must fail – But when there is a sentence of doubtful interpretation parol evidence of the existence of certain facts may be introduced (probably) to explain, tho' the parol declarations of the parties may not –

But latent ambiguities may always be explained by parol averments, because such averments stand well with the written instrument –

Thus when T. S. in his will gives $500 to the charity school in A. and there happened to be two charity schools in A: here parol proof of facts was admitted to show which he meant – So if a devise be "to my son John" and the testator has two sons of that name –

Particular terms of art when used in a writing, may be made to signify different things in relation to the family or property of the person who uses them –

Thus if a devise be ~~to my~~ "I give my estate in Blackacre to my son Thomas and ~~to~~ his children: The technical mea-

=ning of the term would be to convey to T. an estate tail: but if Thomas had any children at the time of the devise that were alive – Thomas and his children would take as joint tenants or tenants in common – This extrinsic fact may be shown by parol proof of the state of the family of the devisee –

So when E. B. had married T. S. and had two children by him and having become a widow had married T. N. and had four children by him – and D. devised Black acre to the four children of E. B. parol proof was admitted to show that D. meant the four children she had by T. N.: by declarations and from by proving that T. S. had abundantly provided for her two children by him – But when D. proceeded in the will to give certain other property to "the children to E. B." parol proof that she still meant only the four ~~children~~ last children was excluded; because this would contradict the instrument which mentioned generally the children thus on the face of the instrument including all the children –

If in a devise T. S. gives his "farm Black acre" without words of inheritance or condition to pay his debts, parol proof may be introduced to show the state of T. S. property and to show what sort of an estate he meant to convey –

So if T. S. gives his "tavern called the Belle tavern" an estate for life would prove provided there be no latent

ambiguity — But it appeared in this case that J. S. owned in the prem=ises but a distant reversionary right only, which as a life estate could not do the devisee any good, a fortiori he was holden to have passed — and parol proof to these circumstances was let in — * who was tenant in tail of the premises —

All the previous exemplifications of the rules laid down in cases of devises — but the principles of them apply to any written instrument —

## Of rebutting an Equity

It is a rule in Chancery that any equity or equitable right arising from an instrument ~~made to rebut~~ may be rebutted by parol testimony altho' such instrument be written. Or in other words parol proof may be admitted for the purpose of rebutting an equitable implication of law —

When we observe in the books the multitude of cases in which parol proof is admitted in Cha. when the subject matter of dispute is a writing we are at first apt to imagine that the rules respecting the admissibility of parol proof when the contract is in writing do not apply there: but the fact is otherwise; And courts of equity are compelled to give the same construction to a stat as a Court of law

# Evidence.

The rule therefore by which parol proof is admitted does not contravene the rule of law. Thus it is a rule of law that when a man makes a will disposing of his estate, and when thus disposed of a residuum is left: such residuum belongs to the Exr. who is constructively the residuary legatee — But in some cases courts of Chan. will not allow of this construction: for where in ~~the will~~ the will a legacy to such an amount is given to the Exr., as that it would appear by a reasonable construction that the testator gave him all he chose ~~to have~~ him to have — then Cha. will not consider him as the residuary legatee: This is an equity or an equitable implication arising from ~~law~~ the instrument itself and not from any thing extrinsic — And this equity may always be rebutted ~~able~~ by parol — By the will the Exr. has a legacy of $500. This bequeathe raises a presumption in favor of the heir that the testator did not intend that the Exr. should have any thing more

But as this is an equitable and not a ~~least~~ legal construction of the instrument the Exr. is now admitted by parol to prove that the testator had declared upon his death that if there should be a residuum the Exr. should have it, thus the equity is rebutted and the law construction is restored —

So also was formerly the case of a bond given

by a man before marriage to his wife payable after his death - such a bond is now considered good at law - and so the case of a bond thus given payable during coverture which is void at law. The equitable construction of such bonds was that they were as covenants as things expec= =utory and not void - But this equitable construction may be rebutted by parol - The Dy.ts, may show that more than the contents of the bond were pay paid by the hus= =band for this very purpose and thus the legal construc= =tion is restored by which the bond is void.

This equity may first be raised by parol and then rebutted by parol - for whether the equity arise in this way or in any other the principle is the same. Thus when A. employs B. to purchase for him real property, delivering to him for that purpose $500. B. purchases the land with the money but takes the deed in his own name. These facts being shown by parol Ch. will consider the equitable title to the land as in A. - And this equity arises out of the whole transaction. But it may be rebutted by parol - as if A. & B. come to a subsequent agre= =ment &c - And thus parol proof may be admitted always to rebut an equity and restore an instrument to its legal op= =eration - And there is really no other case where parol proof is admitted, when the contract is in writing, in Equity none

# Evidence –

than in law – The following case ~~may~~ may seem to oppose this rule, but it does not – Where A. leases Black acre to B. for $40 and by a subsequent agreement by parol A agrees to take $20. – This parol agreement to take but $20. cannot be a bar to any suit at law for the $40. But if from some equi=tatte rights only the lessor be compelled to sue in Cha. for the $40. as if under that lease certain duties be to be per=formed by the lessee the parol agreement may be pro=ved – not indeed for the purpose of destroying or affect=ing the lawa written lease – but for purpose of being offsett against the lessors equitatte claim of a specific performa=nce whoever would have equity must do equity and ~~unless~~ unless the lessor will abide by the subsequent agreement Cha. will not assist him but will ~~relieve~~ leave him to get what relief he can at law – Cases of this discription then cannot be said to oppose the foregoing rule –

# Presumtive Testimony –

Presumtive testimony is that where by a thing is infered from the existence of circumstantial ~~evidence~~ facts Constructive testimony is nothing more than presum=tive testimony arising from certain written papers in

conjunction with the existence of circumstances: Thus A. leases a farm to B reserving $10 rent: but he cannot prove expressly that B. promised to pay it, he therefore resorts to the deed of lease by which it appears that the sum of $10 was reserved and that the deed was delivered to B. this in conjunction with the fact that B. went on to the farm and cultivated it: having paid him one year's rent perhaps – is constructive or presumptive proof that B. promised to pay it –

So when A. sued B. for rent accrued during the 1798. and B. produces receipts ~~of~~ for rent accruing during the year 1799. and an other for 1800. – From there a presumption is raised that the rent for the year 1798. is paid tho' no receipt is produced for it –

When it is utterly impossible that the fact contended for can exist in conjunction with the circumstances or attending facts proved, then such presumption amounts to positive proof –

Presumptions are weak or strong as the case may be – But most presumptions may be rebutted.

A *presumtio juris de jure* cannot be ~~not~~ rebutted –

# Powers of Chancery

The difference apparent in the decisions at law & equity arises in the great measure from Chancery applying the principles of ~~all~~ Civil in cases where a court of law stops short — examples of fraud, fear in illegal contracts

the maxim that it is discretionary with a court of Equity to grant a relief enables them to refuse it unless the applicant will do Equity and to grant it on that condition which they prescribe — cases of illegal contracts — mortgages.

Mitf. 5 — 3 Bl. 429. 1 Ro. 374. 10 Mod. 1.

the rule that they will compel a trustee to perform his trust ~~together with the maxim that what is agreed to be done is to be considered~~ given

this court jurisdiction in a variety of cases which is consistent with the jurisdiction of a court of law the case of legacies &c

3 Bl. 430. 2 Bl. 203. 343. 3 T.R. 227. 435. 2 Atk. 239. —

the rule that Chancery considers what is agreed to be done as done is to be understood thus after that time is elapsed when it was to be done the person to do is a trustee for the person to whom it was to be done — as an agreement to convey if not performed he holds the legal title in trust for the person to whom the conveyance is to be made — they bind by decreed to be defaulters & have no remedy for the specific of the contract

3 Bl. 431. ~~433.~~ 435. 4. 1 Bl. 61. 1 Fonb. 22. Ing. 264 —

no regard is had to the money done to consequential it is damages in any case

# Powers of Chancery.

The general powers of Chancery are not easily defined. The principal difference between a court of Law and a court of Equity is said by Lord Kaims to consist in two particulars 1st That it is the province of a court of Equity to abate the rigor of the common Law 2d That a court of Equity decides according to the spirit of the rule and not according to the letter Again it is said in 3d That fraud, accident, & trust are peculiarly cognizable in chancery. 4th it has been said that a court of Equity is not bound by rules or precedents.

As to the first particular, the power to abate the rigor of the common Law was never were claimed by a court of Chancery. In many instances the rules of the common law operate inequitably and may be said to work extreme hardship; but in such cases if it appears upon a fair construction that they are within the common law rule it is impossible for a court of Equity to afford any relief. It being clear that Equity cannot control law.

As to the second a court of Chancery are as much bound as a court of Law & no more to decide according to the spirit of the rule

is a maxim of the common law the rule of construction is the same in both courts.

Chancery cannot exert its specific relief concerning purchases and matters because a sum in damages is a sufficient reward: but where it is not it may be — first of a family purchase — now is delicate in procuring testimony of it on that account you go into Chancery you can get for purposes of justice but no use of it can be made to ~~recover~~ avail the applicant of penalty — the case of usury — the case of a second distraction of a person

Pow. D. 671.
4 Term. 147.
1 P.W. 267.
548. 695.
3 Atk. 177. 544.
5 Com. 74. 5.
3 Ath. 151. 2.
2 H. Bl. 263.
1 Wils. 16.

~~The nature of the application~~ of an offsetting purchase matter — of relieving against lapse of time — ~~the~~ it proceed upon the ground of relieving against a penalty, it relieves mistakes and prevents men from taking any unrighteous advantages

3 Bl. 431.

it as a ~~pen~~ means of law that a contract entered into upon the mutuality intended does not take place for want of a confirmation not being done but in case of mistake there is as no confirmation for such contract ~~&c~~ —

1 Atk. 600.
3 M. 432.
2 P.W. 640. 680.
2 Term. 289.
316.
3 Atk. 620.
Pow. mort. 321.
112.
mitf. 4. note.

How need an advantage is taken of a mere fiduciary to get a bargain of

3 Bl. 381. 2.
437.

# Powers of Chancery.

As to the third Fraud of perhaps every kind is in some way cognizable in a court of law and some times exclusively so; as in case of a devise obtained by fraud.

Many accidents are also remedied in a court of law as loss of deeds, mistakes in accounts, contingencies that make the performance of a condition impossible &c. Many accidents are not relievable in a court of chancery. Technical trusts indeed are generally cognizable in Chancery only, trusts are however not always. some are adverted to and enforced in a court of ~~chancery~~ Law as bailments, the implied contract for money paid and received to an other's use &c.

As to the fourth head. Courts of chancery are clearly bound by rules and precedents. The Chancellors of this day consider themselves bound by inconvenient and objectionable rules, nay in some instances by the absurd rules of their predecessors.

The essential differences between a court of Law and and Equity courts consists principally in the different modes adopted by the two courts administering justice. 1st In the mode of proof 2nd In trials 3rd In the mode of relief.

1st As to the mode of proof. A court of Chancery compelled defendants to disclose under oath all such facts effecting the rights of the parties, as rest in their private

# Powers of Chancery.

knowledge only. Hence the jurisdictions of Equity in distributions ~~frauds &c~~ partnerships frauds &c. A discovery being thus obtained the judgment in the same as it would have been at a court of Law.

2d. As to the mode of trial. The trial in equity is by interrogatories on which depositions are taken out of court. And if witnesses are abroad or shortly about to leave the country or are aged or infirm; the depositions are to be taken by a commission issuing out of Chancery for the purpose. In consequence of this power to take depositions Chancery exercises a jurisdiction which would be used at Law if the witnesses could attend.

3d. As to the mode of relief. A court of Equity can grant specific relief which a court of Law in ordinary cases cannot do as in case of executory agreements to sell a purchase lands &c. In this case a court of Equity will compel a specific performance ~~of~~ of the agreement that is will oblige the party which is bound by it to execute it specifically. But a court of law in such case can give damages only for the non performance of the agreement.

Upon these three & two other incidental grounds viz. the true construction of securities for money lent &

Q. Swift. 4 2 o. 2.

Amb. 416.

# Powers of Chancery

the effect of a trust, vests the jurisdiction of Equity as contradistin=
=guished from a court of Law.

Mr. Swift seems not to have perused with sufficient at=
=tention the pages of Blackstone where this subject is con=
=sidered — particularly the two last grounds of equitable ju=
=risdiction —

## The powers of Chancery to decree specific execu=
=tion of Contracts —

A power which Chancery exercises exclusively is that of decreeing specific performance of contracts. By this pow=
=er is not understood that Chancery can enforce an execu=
=tion to carry its decree into effect — The mode of enforcing is to impose a penalty in case of disobedience —

At com. Law this power of decreeing a specific execu=
=tion did not exist but the only remedy on a contract was in ~~[illegible]~~ damages — The power is not exercised by Chancery because no remedy can be had at Law but because justice in many instances requires that a different rem=
=edy should be had — And it is a general rule that a contract to be enforced in Chancery must have all the requisites of a contract binding at Law. No stat. ever vested

Latch 172.
2 Pow. C. 4. 6.
1 Roll. ap. 374
368.

1 Freeb. 27. S.

2 Vern. 480.
1 Pow. Ch. 444.
2 Do. 255.
1 Freeb. 187.
2 P. Wms 248.
2 Atk. 97.

different construction of instruments at Law & Equity

2 Pow. Con. 17.
2 Vern. 157.

2 P. Wms 248.

2 Bl. ap. 944.
1 Pow. C. 316.
2 Ver. 241.
3 P. Wms 426.

Hardy 116.
7 Ch. R. 185

# Powers of Chancery

Chancery with the power of ~~executing~~ decreeing a specific execu=tion of agreements, but from the time of Edward 4th such a power has been exercised by this court. And since the great contest between Chancery and King's bench in the reign of James 1st this power has remained ~~no~~ undisturbed.

The jurisdiction of Equity in most cases is discretionary whether there is a remedy or not at Law. 2 Pow. Con. 14.

Marriage agreements before coventure will be enforced in Chancery after marriage. A bond also, to secure mar=riage settlements be is considered in Chancery as an agreement, and enforced accordingly; such a bond is now good at Law. 1 Foubl. 89. 93. 1 Vez. 442. 2 P. Con. 5. 6.

When there appears to be an agreement in substance tho' it be void at Law Chancery will carry it into execution according to the intention of the parties. As when a bond is given before marriage by a woman to her intended husband to con=vey land to him after coventure, it will be considered in Chan=cery as a good agreement.

If one of two joint obligors pay the whole sum due on the bond, his only method to obtain a proportional share from the other in Eng. is by a petition in Chancery.

In Con. a suit of contribution in the nature of an Indeb. Asst. lies in such a case to recover what the other

2 Pro. Cr. 7.7.
2 Ven. 494.
1 Ves. 204.—
447—

1 Ch. R. 322.
1 Pro. C. C. 14
254—

1 Eq. Abr. 109. 177.
359. 1 P. Wms. 232.
4 Cy—

The rule in this case as it respects the grantor
it happens to be impossible without his fault

2 P. Wms. 248.
1 Sd. Kay. 515.
2 Pro. C. 14. 17.
254.

or rectify the mistake & make the contract foreman

# Powers of Chancery

obligor ought to pay. But no contribution is allowed in Law or Equity in case of joint tort feazers or wrong doers.

If either the person contracting or the ~~person of the contract~~ subject of the contract be within the local juris=diction of a Court of Chancery it will take cognizance of the cause. This rule is intended I apprehend to apply to those cases in which the subject matter is proper for equitable jurisdiction.

It is a general ~~however~~ rule, whenever a court of Law will give damages for the nonperformance of a contract respecting real property a court of Chancery will direct a specific execution of it. Tho' not against a purchaser for a valu=able consideration without notice. In other cases Chance=ry will not generally interpose.

~~Yet in cases where the agreement arises under mere the acts of the court itself or~~ Where there is in substance a bona fide contract or agreement but by reason of some formal defects, a court of Law cannot give damages, Chancery will decree a specific execution.

It is a general rule that Chancery will not decree a specific execution of a contract where there ~~the~~ is an ade=quate remedy at Law and this rule has been more rigidly adhered to in Con. than in Eng.

2 Pow. C. 213.
Ch. rep. 34.
Ves. 447.
1 P.W. 574. 2 Dg.
305. 2 Atk. 532.
2 Ser & Pa. 488.

1 Hayb. 383.
2 Pow. C. 17.

the case may be subject to be performed on his part
he will be compellable to perform the release
of a Chancery penalty never chancery but may be release
against &c

2 Pow. 214. 222.
2 Dean. 334.
1 Pow. 408.
1 Vern. 217.
1 Eq. ca. ab. 221.
2 Pow. 457. 8.

1 Hayb. 207.
2 Pow. 254.
1 Pow. C. 448
2 Pa. 81.
Pow. 284.

# Powers of Chancery

This power of Chancery is usually exercised about contracts concerning real property only. Courts of Equity will not generally interfere to decree the specific performance of contracts respecting personal property because in most cases the damages given by the courts of Law for nonperformance, are considered as sufficient consideration. the remedy is adequate

But if a contract concerns personalty on one side and realty on the other Chancery will enforce execution of both parts. 2 Pow. Con. 219.

Whenever a party obtains a decree for the specific execution of that part of a contract which is in his favour, he will be enjoined under a penalty to perform that, to which he was bound on the contract.

But when damages would not be an adequate compensation for a personal thing, Chancery will decree a specific performance. Ex. in case of an agreement to transfer stock, which is continually rising in value. In a court of Law the value of the article at the time fixed for delivery or performance of the contract, is always the rule of damages.

If a stat. enacted after the making a contract, renders a complete performance impossible part performance will be decreed in case the party claiming performance desires it. So if the same effect is produced by the act of God.

If the penalty annexed was to enforce the contract then the court decrees a specific performance this is to be learnt from the nature of the transaction as well as from express words - - - - - - - - - - - - - - - - - -

2 Bro. Ch. 241.
1 P. Wms. 170.

7 T. R. 593.
2 Do. 444.
5 Do. 299. 320.
4 Do. 82. 294.
6 to 16. 17
1 Bur. 68.

The rule at law of an estate for life to A for life and then to his heirs. or the heirs of his body. the rule is changed where there is a covenant to the contrary as the same was in how as they expected - the disputed point at law where there are other words indicative of a life estate

Shelley's case
2 Pow. con. 41
1 P. W. 122.
2 P. W. 349.
1 Fonb. 399.

1 P. W. 61.
1 Atk. 572.
2 Ves. 56.
7 T. R. 232.
68. 11 Mod.
468. 1 Fonb.
413. 359.

# Powers of Chancery.

If it appears from the contract that the obligor was to have his det=ion, whether to perform the contract or pay money, Chancery will not decree a specific performance.

It is a rule of the English law that where one conveys by de=vise, grant &c for his life and to "his issue" or "to the heirs of his body, the grantee, devisee &c take an estate tail. But one of the lim=itations carries an equitable the other a legal estate they will not then unite. If the grant &c were to a man ~~and~~ "for his life & his heirs generally", a fee simple would vest in the first taker. Yet if from the terms of the devise it appear the intention of the devisor to give a life estate only to the first taker courts of law will give effect to the intention. A distinction is to be taken between cases in which the first devisee has children at the time of the devise and those in which he has not.

In Chancery, ~~tail~~ an agreement to give to A an estate for life & and to the heirs of his body, or to his heirs in general" ~~are~~ is considered as giving A. an estate for life only and no other words are necessary to manifest the intention of the ~~devisor, except~~ grantor in cases of executory agreements.

<u>Whatever is agreed to be done</u> <u>Chancery considers as done</u>, from the time of making the contract unless some other time is fixed for the purpose. And even if some other time is fixed for execution, the property will be considered as already transferred, if the terms are settled

(a)
As in case a wife before marriage agrees that she will lay out a certain sum of money in <u>lands</u> —

2 Pow. C. 60. 46.
7. Cath. 291.
1 Forb. 349.
1 P. Wms. 274.
2 Ch. 429.
2 Com. 338.

2 Pow. 77.

2 Pro. Ca.
415. Ra. Ch.
156. 2 Pow.
132.

2 Pow. 83. 112.
236. 240.
1 P.W. 483. 3 Atk.
221. 1 Forb.
413. 416.
1 Vern. 596.
583.

# Powers of Chancery.

and the formal part or execution only remains to be completed.

This rule however is not allowed so to operate, as to shelter any fraud — thus if a vendor of land after entering into articles to convey holds the title deeds and is thus enabled to sell the land a second time; this second sale if to a bona fide purchaser shall be binding, the articles notwithstanding.

When there has been no actual contract of sale, but merely an agreement in future Chancery does not consider the property as transferred but as belonging to the original owner who of course in case of a loss must bear it.

If a contract was originally mutual and equal Chancery will enforce a specific execution of it, tho' by subsequent events it has ~~been unequal~~ become unequal otherwise if there was a want of mutuality or certainty.

Money articled to be laid out in the purchase of land is in chancery considered as land. It will pass by the devise of all one's real estate; yet a person who has the absolute ownership or fee simple of money, thus circumstanced he may at his election consider it personal or real estate and of course bequeath ~~bequeath~~ it by a will not attested by witnesses. Money agreed to be laid out in land is subject to the husband's curtesy, but not to the wife's dower. (a)

When a bill is brought for the specific execution

(a)

Because in this case an adequate remedy can be had at Law is the reason why the Deft. may demur — 2 Pow. 216.

(b) In law the court of Chancery try the issue themselves

2 Pow. 217.
1 Vern. 189.
3 Ath. 383.

by his

a bond as grows with condition to perform a variety of things as to give a deed to the Pl. to procure a release to the Pl. of a debt which he owes — to pay all the previous debts. to pay annually a sum to the Pl.

1 P.W. 571.
2 De. 385.
3 Ath. 383.
2 Pow. 223. 225.
Ne. 1 Bro. Ch. 226.

2 Pow. 221.
2 Vern. 12. a
72. 1 Vern. 227.

2 Pow. 221. ~~2 Pow. 224.~~
2 Vern. 72. ~~2 Vern. 72.~~
1 Vern. 227. ~~1 Vern. 7.~~

1 Ves. 7. 450.
1 Ath. 10.
1 Pow. 241.
2. 2 De. 241.
256 =

# Powers of Chancery.

of a contract for (a) money, ~~paid~~ If the Deft. does not demur or object to a trial in Chancery, that court will decree a specific performance.

(b) So if an agreement is ~~decreed~~ denied in chancery and an issue is directed, that court will resume the equity, arising from the facts found, and make a decree accordingly. 2 Pow. 216. If bonds have been given for the performance of a variety of acts, Chancery will to prevent the trouble and circuity of suits for every breach, fix a penalty which will either compel a strict performance or be an adequate compensation for non performance. Articles of agreements ~~are thus treated~~ between merchants are thus treated.

Agreements to transfer stock are specifically enforced always Chancery will sometimes decree a specific execution of an agreement against which they would not grant relief, as in case of an unreasonable contract unattended with fraud.

Any unfairness in the ~~petitioner~~ petitioner in Chancery will prevent an interference of its power in his favour.

A contract must be certain and originally mutual & no decree of a specific execution can be obtained.

An executory contract merely ~~voluntary~~ ~~voluntary~~ voluntary, is seldom enforced in Chancery. On such a contract even under seal, nominal damages only can be given at Law.

1 Bro. 341.
2 Ro. 242.

why not as land there was no meeting of the minds in such a contract - in action founding out mistake sales for money had & received when money is paid by mistake yet if A conveys to B under a mistake in both as the sale of the land well subsists & passes - not any mistake of mind the same gives non restitution only by damage in a fact of land.

1 Ven. 82.
1 Ver. 126. 400.

but if the mistake is as to there legal rights

2 Bro. 176.
222. 224.
261 —

# Powers of Chancery

When nominal damages only are given at law, Chancery will not decree a specific execution.

It is a general rule if Chancery rescinds an agreement it will by its decree do perfect justice between the parties, of course many contracts will be rescinded in part only, as where part payment has been made.

Chancery will sometimes rescind an agreement on account of mistake. It is a rule where there is a mistake in that without which the contract or agreement would not have been made Chancery will rescind.

So where parties have mistaken their rights in framing contracts Chancery will relieve against them. As where a man having been driven into a contract by duress, affirms it after the duress has ceased, not knowing that it might be avoided.

A court of law will interfere and give a remedy where money has been paid by mistake: But in this case Indeb. Asst. is in nature of a bill in Chancery. But tho' contracts will always be set aside by Chancery, if procured by mistake, misrepresentation, false suggestions, be yet in common cases of this kind Chancery has denied. Will ~~the parties~~ leave the parties to their remedy at law. There is a kind of "pia fraus" that Chancery will not ~~compel~~ ~~decreed~~ specific execution. As where a sharper had by intrigue, ~~he was~~ he prevailed upon a man to devise his estate from his family, he was himself defeated by counter misrepresentation

3 P.W. 130. n.
1 Bro. con. 29.
1 Atk. 17.
1 Ath. 62.

In cases of rescinding contracts where the remedy is complical at law

2 Ven. 364.

1 P.W. 118.
639.
1 Bro. Ch. 369.
2 Bro. 160.
184. 264.
3 P.W. 298.

# Powers of Chancery

which induced the testator to revoke his deeds and to give his es=
=tate to his family.

Where there is a fraud in real contracts Chancery will interfere and give relief. In case of personal contracts their interference is not universal. Yet even if the contract be per=sonal and one of the parties be exposed to injury from the bankruptcy of the other Chancery will step in to ~~the~~ his relief.

Mr. Reeve supposes inadequacy of price will render a con=tract void in Equity. This inadequacy at least furnishes evi=dence of something that will make a contract void.

Intoxication is a sufficient cause for setting aside ~~a con=tract~~ an agreement in Equity, if it was superinduced by the opposite party. Mr. Reeve thinks that Chancery ought to relieve when one takes advantage of the intoxication of another in a bargain, whether he was instrumental in the ~~in~~ intoxication or not.

Chancery will also interfere and set aside contracts enter=ed into for the purpose of defrauding third persons. 2 Pow. 6. 1 Ven. 445.

~~Fear~~ occasioned by fear of some unlawful violence, tho' it does not amount to legal duress is a sufficient ground for chancery to proceed upon in rescinding a contract. Yet a mistaken ~~than~~ degree of ~~forbearance~~ reverence for parents and other

2 Pow. 166.
2 Ver. 295.

3 P.W. 191.
2 Vern. 346
2 Atk. 94.
1 Ve. 354

# Powers of Chancery

superior furnishes no ground of relief - A court of Law can give damages only in case of a legal duress -

Contracts repugnant to sound principles of policy will be rescinded in Chancery. There is no good reason Mr Bouvier thinks why a remedy may not be had at law in all these cases. Indeed courts of Law have made advances towards granting remedies on the broad principle of policy; but they early took their stand and said thus far will we go and no farther. Now in all cases in which agreements will be set aside at law, there is no need of the interposition of Chancery since an illegal contract contract is a nullity and need not be rescinded -

But there are two classes of cases under this head, to which courts of law have never extended their jurisdiction. The first of these is the case of marriage bonds and contracts which are set aside in Chancery on the ground that they have a tendency to destroy domestic peace - The 2d class of cases consists of bargains for the sale of expectancies of young heirs as they are called in the books; such bargains are rescinded in Chancery because they tend to encourage prodigality -

Had courts of Law extended their own principles so as to embrace these two classes of cases, the interposition of chancery would be superfluous and unnecessary - In Eng. Chancery exercises a jurisdiction over usurious contracts - In Law such contracts

Usurious contracts are liable to be defeated both in Eng. and Connecticut in a court of Law by pleading the usury but the usury in this case must be proved as in other cases by disinterested witnesses if there=fore the obligor cannot prove it in this manner he is without remedy at law, but he may apply to Chancery in Eng. and appeal to the confidence of the obligee and provided it appears from his testimony that the contract is usurious Chancery will relieve against it so far as to cut off the surplus of principal and legal interest but the petitioner must pay the sum borrowed and the lawful in=terest. ~~but the~~ & Mr Reeve knows of no reason why the same proceeding may not be had ~~at~~ in Connecticut. But we have a further stat. in Connecticut provided by stat. which is this if the usurious obligation is sued and the Deft. finding that he cannot defeat the obligation by proving the usury by disinterested witnesses he may on the second day of the setting of the court to which he is sued file a bill against the ob=ligation stating it to be usurious and the court is empowered to proceed upon the bill according

1 Alth. 450.
2 Dr. 393.

aside in a ~~co~~ court of Law — When the stat. on this subject was first enacted, if a man was sued on a usurious contract and compelled by force of Law to perform it, he might come in=to a court of law again to recover the sum paid. This in case of an action brought on the contract was an adequate rem=edy. But the party in whose favour the contract was might delay to bring his action, till the evidence of the usury was lost in which case the opposite party would be remediless. But here the parties by the interposition of ~~the~~ Chancery are placed in the same situation as before the contract —

The ground on which Chancery interferes in usurious contracts is the presumption that undue advantage has been taken — And had the law extended relief to these cases only, where such advantage had in fact been taken its prin=ciples would have been preserved entire — But Chancery will relieve against all usurious contracts, whether they were obtained by undue advantage or not — The reason why a party goes into Chancery in Eng. is that he has there a remedy which he cannot have at Law, by applying to the conscience of his adversary — The stat. against usurious contracts it is true subjects the criminal party to a penalty and it is a rule that a man is not compellable compelled to testify where by so doing he will subject himself to a penalty — But as

to the principles of chancery, that is to enquire of the Pltff. under oath and if it appears from his testimony that the contract was usurious, the court are by stat. directed to cut off the whole interest legal as well as usurious and render judgment for the ~~principle~~ principal only against the Deft. with costs —

# Powers of Chancery.

this penalty in Eq. is given to the party injured, he of course may waive it and call in his opponent to testify — In Com. the party demanding unlawful interest is made liable to a penalty which is given to any common informer, and therefore according to the common law rule such party cannot be compelled to testify — But this case is provided for by stat. for if an action is brought on an usurious contract, the Deft. may file a bill in appeal to the conscience of the Pltff. who if he refuse to testify, will be nonsuited and compelled to pay costs — If he do testify and the contract is found usurious, judgment is that the Pltff. recover the principal only of the sum lent or loaned — Yet such are the provisions of the stat. that judgment must always be for the Pltff. And if the contract on which the action is brought, be wholly usurious that is such an one as is entered into to recover unlawful interest on another contract, the court will give nominal damages only.

## Chancery's interference to set aside unlawful contracts.

The idea that a man might avoid a contract at law is a novel one.

Originally no parol proof could be admitted to show fraud,

(aa) 2 Wilm. 339. amb. 641. 3 Atk. 1568. 1 Vern. 482. 2 P.W. 432.
(x) (b) 1 Raw. 341. 2 Atk. 242, 274. 2 P.W. 245.

a contract which the Stat of frauds & perjuries requires should be in writing if it is parol is as void in Chancery as at law but if such parol contract has been executed in whole or in part by one party Chancery will decree the other party to perform it as where A agrees to by parol to give a deed to B a plantation of land for £1000 paid to B agrees to give that sum if there is nothing more in the case neither are bound and Chancery cannot enforce it for all parol agreements respecting lands are void by the Statute of frauds & perjuries but if B had paid the purchase money to A or any part of it his part of the agreement being executed in part or in whole in such case Chancery will compell A to give the deed altho the agreement was by parol — so too if A had by parol lent a farm to B and there was nothing more in the case A would not be bound but if the bargain had been that B should pay him A by building a stone wall on the premises & B had entered & built the wall Chancery will compell A to give the lease — the principle in all these cases is this you are not obliged to fulfill your parol contract but if you make such use of it as to derive an advantage to yourself and thus refuse it will be a fraud which Chancery will not indulge in as in the last cases put in the first A got B's money & in the last he got a stone wall built

# Powers of Chancery.

tacitude, or mistake and hence we see the reason for the interference of Equity. But now in Eng. parol proof is admissible to show tacitude of every discription - except fraud 2 Wils. 347.

And in Con. they have gone still farther and admitted such proof to shew fraud of any kind -

(a a) Bonds given in consideration of past cohabitation are good but those that are given in consideration of future cohabitation are void -

(b) Agreements merely voluntary are not in general enforced in Chancery. Yet in some cases they are; as where a man after marriage makes a reasonable settlement on his wife -

If a party seeking a specific execution of an agreement, has shown backwardness in performing on his part Chancery will rarely interfere in his favour, especially if circumstances are altered by his conduct or during his delay -

When a contract has been dormant for a long time Chancery will not decree a specific execution, unless special circumstances warrant the neglect - 2 Bro. 260. 5 Ves. 584.

When contracts are rendered void at law by reason of the stat. of frauds, Chancery will in some cases interfere and enforce them - As where the contract is executed or partly executed on one part; or where something has been omitted in the writing by fraud or mistake &c - (c) 1 Bro. 274. 428.

In latter times Chancery has exercised a power of re-

courts of law obstinately refused to relieve against penalties
this induced courts of chancery to relieve to prevent
the manifest injustice that would arise if no fresh pun-
ishment could ever inflict after chancery had granted this
pardon or statute in mitigation courts of law will the pain
of chancery penalties

2 Pow. 204.
2 Vern. 316.
2 Eq.
3 Atk. 520.
9 Mod. 112.

2 Pow. 204

# Powers of Chancery.

=living against penalties. Not longer ago than when Sir Thomas More was first Chancellor, this power had never been exercised. Since that time statutes on the subject have been made in Eng. and in several of the U. S. These statutes embrace all cases where one binds himself under a penalty to pay money at a certain time, or to do some collateral act and vest in courts of law the power to chancer down such bonds to what is justly due. We have such a stat. in Con. The ground on which Chancery grants relief in those cases is that it is contrary to sound policy to give exhorbitant penalties and the court in no instances have given relief where the penalty is small.

If it appears from the contract that the sum to be paid is in the nature of agreed damages for non performance Chancery will not relieve. But if on the other hand the sum to be paid is a mere security for performance the court will chancer it. If neither of these meanings are with certainty to be collected from the face of the contract the sum conditioned to be paid is always construed not to be in the nature of damages agreed but a penalty.

Yet it seems where Chancery can give some compensation in damages and where there is some value or rule by which to estimate these damages Chancery will

If a bond with a penalty is given for the performance of a contract, or of a penalty is inserted in a contract to enforce performance, the party seeking specific execution must in his bill waive the penalty.*

* 2 Ven. 60.
2 Pow. 204.
136. 2 Ch. 214.

*
2 Pow. 214.
1 Sid. 442.
1 Bac. 544.

# Powers of Chancery

relieve tho' the covenant ~~actually~~ or agreement actually ope=
=rates by way of a penalty—

If a bond has been given for the performance of covenants chancery will direct an issue of quantum damnificatus in a court of law, & decree according to the verdict of a jury—

If a bond to perform a collateral act or to pay money by different instalments be sued upon, the court will chancer it, as often as an action is brought, and this may be as often as any breach may happen— 2 P.W. 19. 10 Mod. 517. 2 Ver. 52. 6 Bro. Ch. 417.

Chancery will never relieve against a penalty wen so large imposed by itself to compel obedience to its own decrees.

If a contract be entered into respecting real property and the parties bind themselves under a penalty which ap=
=pears to be in the nature of damages for non performance Chancery will not decree a specific execution of the agreement. But if the ~~parties~~ penalties appear to be a security for per=formance a specific execution will be decreed— Thus it seems each case under this rule will stand on its own mer=its— 2 Ven. 119.

An other subject of equitable jurisdiction is a mort=gage— The same wil originally existed upon mortgages as upon penal bonds and equally called for the interposition of Equi=ty— At law mortgages are regarded as absolute estates in

# Powers of Chancery

Mortgages, defeasible only in the ~~form of~~ performance of the conditions — Thus the Mortgagor was frequently oppressed, since it would frequently happen that he could not perform the conditions by the time stipulated and since a mortgage was frequently held as a security for a debt not amounting to one half of its value; the doctrine which prevails in Chancery is very different ~~in this country~~ the Mortgagee is merely a trustee to the mortgagor when the confideration is performed the estate is in the Mortga=gor when the ~~confideration~~ condition is performed the estate is the Mort=gagee, & it is a general rule that every naked trustee is com=pellable in Chancery to reconvey — such a trustee a Mortgagee after payment is confirmed. In compelling the trustee to con=vey however Chancery will do complete justice between the parties, ~~without a resorting to the rem that might be neces==sary at Law~~.

There is one which falls within the jurisdiction of Law and Equity — Where compound interest is reserved on a note on the event of non payment of annual interest both Chancery and law will relieve against the compound interest — Yet interest is always to be paid annually unless it be otherwise agreed & therefore a contract reserving interest upon interest is not usurious. The principle on which the court interfere is said in the books to be, that to allow of such interest is

if A give to B a note for £50 an interest growing to pay the interest annually & if not paid to pay the interest upon interest it would not be usurious neither could the obligee recover the compound interest but an obligation would have precisely the same effect as if the note had been upon interest without more words

3 Bac. 17 B.
2 Com. 465.

2 Show. 69.
1 Eq. ca. ab.
2 Vl.

* 2 Bl. 222 & 2 D.
3 B. & Ald. 94.
1 2 Br. Frame
4 Ch.
on the leaf
at the top

# Powers of Chancery.

unconscionable — But Mr. Reeve supposes that policy is the true ground of the inference — For if compound interest was allowed, some who would otherwise support their families and ~~their~~ educate them so as to be useful would be reduced to beggary — They must be ~~supp~~ preserved from the consequences of their own follies —

## Power of Chancery to issue Injunctions.

An injunction to stay waste may issue from Chancery in all cases where an action of waste will lie at Law and in many others where the action of waste will not lie. Thus courts of Law can never give ~~an~~ a remedy in an action of waste against ~~one~~ one who has the legal title as trustee; yet Chancery will issue an injunct=ion against such trustee —

Chancery will also issue a similar injunction against ten=ants in tail after possibility of issue extinct, tho' he is not li=able for waste at law — In the last case however Chancery will not issue an injunction, unless the tenant has com=mitted unreasonable and wanton waste —

An action of waste never lies at Law against one having a larger ~~estate than for life~~ interest than an estate for life. And no person can maintain an action of waste unless he has an estate of inheritance — 2 Bl. 281.

2 Show. 169.
2 Vern. 738.
Eq. Ca. Ab. 99.
2 Atk. 216.
1 Salk. 161.
Ambl. 107.
2 Bro. Ch. 89.

3 Bac 192.
2 Cons. 46.
1 Vern. 229.
4 Eq.
2 Vern. 71.

# Powers of Chancery.

An action of waste will not lie in favour of a remainder man or reversioner, if any other estate intervenes between his remainder and the particular estate in ope. - yet Chancery will grant relief by an injunction in favour of a remainder man so circumstanced. So in favor of a contingent remainder man.

If a lease for life is made "without impeachment of waste", Chancery will notwithstanding issue an injunction against the lessee if he commits wanton waste.

If in case "without impeachment of waste" mines are mentioned among other things, old mines opened may be wrought by the lessee. But according to the authorities new mines cannot be opened. This rule must frequently be contrary to the intention of the parties especially when no mines are opened at the time of making the lease.

An injunction lies to stay proceedings at Law - after the suit commenced, after verdict and before judgment, after judgment and before execution, or even after execution. This injunction lies against all suits on contracts, which tho' good at Law are void in Chancery.

Chancery when it issues an injunction lays a penalty to enforce obedience; which penalty in Con. may be enforced in a court of Law. The federal court however refused to sanction or sustain an action for the collection of such penalty.

1 Atk. 628.
3 do. 350.
Amb. 56.

# Powers of Chancery.

Injunctions are either temporary or perpetual. Injunctions are usually to the parties or court, but not always.—

In Com. fraud may ~~not~~ be pleaded in bar of an action at Law yet the party injured by the fraud may have a remedy in Chancery, since the opposite party may delay to bring his action till the evidence of fraud is lost.—

In Eng. if one is sued which on a bill ~~filed~~ filed in Chancery is found to be fraudulent Chancery will issue a particular injunc=ion to stay proceedings at Law. 1 Ven. 489, 2 Com 48.

Injunctions are sometimes granted without trial. As if one be sued on a contract where a recovery must be had at Law but which is void at Chancery here the injunction is temporary. But if the decree is in favor of the petitioner the injunction becomes perpetual.— If judgment has been pronounced at law the injunction goes against the court and party, to prevent the taking out ~~the~~ of execution if execution has issued it goes against the sheriff to prevent a levy. If money has been col=lected on the process, it goes to prevent the sheriff from paying it over.— But after the money has been paid over no injunc=ion will issue.—

In Com. the superior court is a court of Equity as well as of law, as is also the court of Com. Pleas of course it may frequently happen that these courts will have to issue

# Powers of Chancery

injunctions against themselves. A case of this description arose in the superior court. An action at law was brought on a bond in which there was a mistake of £100 and in consequence of the rule "that no parol proof can be admitted to vary the operation of a writing" judgment was for the Plff. notwithstanding the mistake. But on petition of the Deft. the superior court as a court of Chancery issued an injunction against the superior court as a court of law.

If a Mortgagor covenants that he will not apply to a court of Chancery to be relieved against a foreclosure and the Mortgagee sues for a foreclosure Chancery will grant an injunction to stay proceedings notwithstanding the covenant and if a suit at law is brought on the covenant an injunction to stay proceedings ~~will~~ in this suit will also issue.

A court of Chancery will relieve against frauds, so they will grant an injunction on suggestions of fraud to stay proceeding in a court of law. 1 Vern. 489. 2 Com. 48.

Chancery will issue an injunction against an Executor forbidding him to act as such pending a suit respecting the executorship. Hom. Rep. 93. 2 Bro. 420. 1 Ibid. 179. 1 Toub. 68. 1 Keb. 682.

Injunctions in favor of ~~others~~ authors and against such as attempt to republish their books were frequent even before the stat. of Ann. This stat. has given authors a legal redrs in these cases. 1 Toub. 30. 2 Com. 52. 8 Bro. 174 Show. 248.

4 Burr. 409.
2417.

Bro. Ch. 261.
1 Bro. P. Ca.
226. Stra.
404. 1 P. W.
671.

2 Atk. 302.
2 Bro. 64.

# Powers of Chancery

It was however the opinion of Ld. Mansfield and two other judges that an author has an ~~exclusive right~~ exclusive right to his works at Com. law. In the house of lords 8 judges were of opinion that the remedy at com. law was taken away by the stat of Ann. Pro contra.

The English courts of chancery have lately issued injunctions to prevent a party from multiplying suits by repeatedly bringing act=ions of ejectment for the same cause, for as the facts upon which the action is founded in Eng. are fictitious numberless suits might be brought on the same cause of action if there was no such in=terference.

In Con. as the proceedings in Ejectment are not fictitious such interference is necessary.

This power of chancery to issue injunctions has been exer=cised in ~~civil cases~~ criminal cases but the courts will inter=pose only in cases peculiarly circumstanced. If when there is a contested right between parties and law makes it crim=inal to invade that right & prosecution be commenced under this law, Chancery will issue injunctions to stay proceedings till the right be decided so where it appears that the right is soon to be tried in a suit pending in a court of Law.

In Great Britain this power of chancery is exercised over all the courts in the kingdom. In Con. an injunction never issues against a court of probate, because an appeal

1 C.W. 22.
2 Ds. 171.
3 Ds. 211.
Nov. Ch. 542.

1 Wern. 471.
2 Ds. 679.
3 Ath.
2 54
7 Sall. 154.

# Powers of Chancery

ter from any decree, order, or sentence of that court to the superior court or a court of Law and not as a court of ~~E~~ Chancery.

## Power of Chancery in other cases.

1 In Eng. Chancery has jurisdiction of the payment of legacies. The principle upon which Chancery compels payment of Legacies is that the Executor is a trustee to the legatee and that whenever there is a trustee ~~in~~ Chancery will compel him to execute his trust.

In Con. legacies are by stat. recoverable in a court of Law, and they adhere strictly to the rule that where an adequate remedy can be had at Law Chancery will not interfere.

Our rules in Chancery are generally the same as in Eng. unless where our statutes have given the courts of law concurrent jurisdiction.

It is a rule in chancery that whatever is agreed to be done is considered as done. Thus if a man in his will directs land to be sold and turned into money, which he does not bequeath in legacies. Chancery will ~~compell~~ compel a sale of the lands and distribute the avails as personal property and vice versa. But this rule must be taken with one qualification. If a man devises land to be sold for a particular purpose and the avails of the ~~said~~ sale are ~~or more than~~ sufficient, to answer that purpose, the residue is considered

# Powers of Chancery

as reverting back to the heir at Law.

If there are no provisions of stat. to the contrary, it is incident to Chancery where lands are devised by will for the payment of debts after sale, to compel a sale on a bill filed against the trustee At Com. Law if the Exr & Heir refuse to sell in this case, the creditors were left without a remedy.

If an Exr refuses to accept the trust where lands are devised to be sold ut supra, Chancery has the power of appointing another — And the avails of the sale will be ordered to be brought into Chancery and distributed among creditors pari passu.

The principle upon which chancery interferes in this case, is that the Exr or whoever accepts the trust is a trustee.

In Con. the Courts of probate may direct the Exr to sell where lands are devised to be sold for the payment of debts & if he refuse he forfeits ~~he forfeits~~ his bonds. — But if lands are directed to be sold ut supra by some trustee other than the Exr and he refuses to execute to execute his trust Mr Rowe supposes the remedy must be in Chancery for the court of probate has no authority over such a trustee since he does not give bonds to the court.

+3 Chancery has power to compel a sale of an equity of redemption — An equity of redemption is unknown to the common law; for the estate in the case of a mortgage is considered absolute

The ~~contra~~ gift & testacies by a tenant to guardian
1st Plu 120 Cost notes 2d Vez 543 1st Vez 539 9th Vez 292
182 the power of claiming over their
power to enforce marriage of female ward they forbid
the marriage - Tab 458 1st Plu 362 1st Vez 160 2d Plu
114 2d Atk 314 - guardian & ward as lovers -
the infer of adventurers gains bargains obtained by father over
a son 1st Wyh 65 Sled - 2d Atk 98 - 85 1st Brown Cas 3 by

# Powers of Chancery

in the mortgage. But it is otherwise in Chancery.

Hence Chancery will order a sale of an equity of redemption for the payment of debts on the ground of a trust.

In Con. an equity of redemption may be attached in the lifetime of the Mortgagor and after his death it goes into probate with the rest of the estate. Hence in this instance we have no need of the interference of Chancery.

1 + 4. An other power of Chancery is that of marshalling assets. In Eng. only the personal estate of deceased persons is liable for the payment of their debts except debts by judgment and specialty and especially creditors by judgment having a priority to others may exhaust the personal fund, while claims of an inferior rank are entirely defeated. But in those cases Chancery will compel the heir to refund the same sum as the specialty creditors have taken of the personal fund and the sum refunded is to be paid to the creditors pari passu.

If the specialty creditors be come on the real estate when the personal fund is sufficient to satisfy all claims, the heir in Chancery may compel the Exr to refund to him the same sum which the specialty creditors have taken from the real estate. The Exr in this case being considered as trustee to him.

5. If one gives an estate in trust to A. for B. A. must execute his trust according to the circumstances of the case. If it

2 Pow. 255.
Pow. Mu. 65.
1 Wern. 356.
2 Dr. 14. 244.
Doubl. 60.
1 Atk. 386.
2 Do 150.
Amb. 409.

# Powers of Chancery

appears from these that the donor or grantor intends the estate should pass at a particular time, when that time comes and not before, Chancery will compel conveyance — So if it was intended that the cestuy que use should have any beneficial use. In these cases the design of the grant will be executed in Chancery what=ever it might be. This beneficial ~~as~~ interest the cestuy que use shall always have, and the trustee cannot deprive him of it — Yet to this rule there is an exception. If the trustee conveys the estate holden to a bona fide purchaser the latter will hold, for it is presumed that he is ignorant of the trust otherwise indeed he would not be considered as a bona fide purchaser —

In Lou. we can have no such exception since we have public records which are conclusive evidence of title.

In case of ~~t~~ implied or private trusts, where by reason of the stat. of frauds no remedy can be had at law against the trustee; Chancery will enforce performance of the trust if proof can be procured by the of the trustee by circum=stantial fraud testimony &c Thus if A employs B. to sell land for him and makes out a deed to B. of the land; the latter refuses to sell but retains the deed or if he sells, ~~&~~ or if he sells and refuses to pay ~~as~~ over the money Chancery will consider him as trustee to A. This is an

2 Vern. 648.

1 P.W. 406.
2 Atk. 630.
1 Bro. Ch.
194. 3 Atk.
262. 1 Ver.
521. 2 Bro.
61.

# Powers of Chancery.

implied trust arising without writing and can be proved by parol.

It is sometimes said that this is making a parol agree=ment respecting lands. But this is not true. It is making an unavoidable inference from facts.

There is one exception to this rule where a man takes a deed of lands for his wife &c.

Fraudulent trust is not regard regarded in a court of Chancery, the estate cannot be recovered after it is conveyed.

6. Chancery has power to grant what is called a bill of disco=very, by which a party to a suit at Law who has not legal evidence is enabled to discover other evidence.

After discovery that the opposite party knows the facts that are wanted in evidence if the case to which the facts relate is proper to be sustained in Chancery; the court will sustain it if the party petitioning desire it; but if the case is proper to be tried at law, Chancery will in some instances sustain it and in others not; Mr Reeve observes that he has not been able to find any general rule of discrimination between the cases.

7. If an agreement is denied in Chancery and an issue di==rected that court will reserve the equity arising from the facts found and make a decree accordingly 2 Pow Con. 216.

# Powers of Chancery

In Con. Chancery appoints a committee and does not send the issue into a court of Law to be tried by a jury for here witnesses may be introduced and examined ~~viva voce~~ otherwise in Eng.

S. On a memorial presented to Chancery they will appoint commissioners to take depositions. But the memorial must shew that there was a more than ~~ord~~ ordinary cause for the proceeding, or that the witness was aged, sick &c.

Formerly the same practice prevailed in Con., but now applications may be made to a court of law.

~~I~~ 9. Courts of Chancery have the power of ordering a person to resign evidence of debts after they have been paid, but not cancelled or given up to the obligor. They have also the power to order evidence of title, to be given up ~~bad~~ when it becomes improper that the holder should retain them, ~~as in~~ as in case of a mortgage when the debt secured by it is paid by the Mortgagor. 9 Mad. 297. 2 Atk. 307. 1 Vern. 479.

In Con. deeds take effect by being recorded the mortgagee therefore may be compelled to recovery on receiving payment—

~~I~~ The reason why a man was compelled formerly to go into chancery when his deeds &c were lost was, that in an action at ~~bad~~ law upon a written contract or instrument the Pltff. may ~~take~~ make proofs of it, when the deed was concealed or destroyed

3 Atk. 17.
1 Ves. 396.
2 Atk. 13.
1 Bro. Ch. 218.
3 Term. 151.

# Powers of Chancery

by the opposite party, there was indeed an other reason. For the fact that the deed was concealed by the opposite party was in most cases known only to himself & courts of law cannot appeal to the conscience of the party. But now both in Con. & Eng. an action at law might be brought on such instrument, tho' it be left if the contents can be proved by other persons, & it may be averred that the instrument is lost "thro' time and accident"—

The party in Eng. may still go into chancery, but not in Con.—for we adhere to the rule that where an adequate remedy can be had at law Chancery will not interfere—

10. An other power which Chancery exercises in Eng. is that of compelling joint tenant, coparceners, &c to make partition—How chancery became invested with this power is not uncertain—Mr Reeve supposes that it might originate from the circumstance of one tenant having taken possession of the title deeds &c in which case the other would have no remedy at law. As each tenant owns the whole estate chancery may have considered each tenant as trustee to the other. However they become invested with this power they now appoint commissioners to make partition whose acts are binding on the parties—

It is brought about by writ of partition & judgment & decree

In Con. the parties never go into chancery—But the sheriff appoints three men whose acts fix the title without

2 Vent. 365
1 Vern. 34.

Ree Ch. 275.
2 Vern. 452.

# Powers of Chancery

ever making returns to the court this depends wholly on practice.

11. Chancery will in some instances relieve against mistakes in instruments, as if different words are used in the writing from what were intended by the parties but if the words used are those intended Chancery will give no relief tho' the words have an import at law different from what the parties really intend. Parol proof is admissible to prove the intent.

12. When the instrument is defective thro' want of proper form Chancery will ratify it, if such interference does not effect the rights of 3d persons; as if a deed has but one witness. There has been no case where chancery has interfered in favor of mere ~~volunteers~~ volunteers. In Con. ~~if deed~~ deeds are required to be recorded. If a grantee thro' fear that ~~the~~ his estate will be attached, delays, to procure his deed to be recorded the estate has nevertheless passed and may be attached and here Chancery will compel a grantee under a reputable penalty to procure his deed recorded. and if he is a bankrupt and cares not for penalties, the court will record its proceedings which will complete the chain of title.

13. Chancery has the power to protect the separate property of married ~~wo~~ women. The practice of ~~Equity~~ Courts having separate property has grown up within a century. But now the husband is a mere stranger to the role and separate property of

P. Ch. 22.
2 Ver. 255.
2 Ven. 493

2 Ven. 480.
2 P. W. 248.
2 Atk. 97.

2 Ven. 487.
1 P. W. 264.
3 P. W. 334.

# Powers of Chancery

the wife and if he invades her rights she may have a sole remedy in Chancery.

Bonds given by a man before marriage to his intended wife, a grounds for bar are enforced in chancery after marriage. In other cases also where the remedy at law has become extinct, by the union of the right and obligation, Chancery will enforce the contract, as where a testator's debtor is made Exr.

All articles of agreements entered into by husband and wife for the purpose of separate maintenance are cognizable by chancery - A husband may convey an estate to a third person to the use of his wife and Chancery will compel the trustee to execute the trust - And now by an Eng. stat. an estate conveyed by a trustee to the use of an other vests absolutely in the latter -

Mr. Reeve sees no reason why a man may not convey directly to his wife -

When one enters into a bond conditioned to have a certain sum to his wife after his death this is good, as a bond, both in Chan. and law.

If a husband borrows money of his wife she is a creditor in Chancery after his death -

Contracts between husband and wife have been enforced in Chancery - And Mr. Reeve supposes that all impor-

1 Atk. 254.
1 Ves. 174.
2 37.

Pre. Ch. 261.
1 Ves. 28.
2 66 308.
3 Bac. 174.
~~Bac.~~ 2 Pow.
217. 1 Ves.
189.

# Powers of Chancery.

=tant contracts without the interposition of Chancery trustees.

14. Some contracts are capable of being affirmed and others not. the rule is this. If the contract has been set aside as unlawful it cannot ever be affirmed, otherwise it may be, unless the rights of third persons are affected.

15. Courts of Chancery have taken it on themselves to relieve against the lapse of time. Thus they grant relief where a man thro' accident has been disabled to perform his contract by the time limited. So they have relieved even in cases where there was some degree of negligence. As where a man was to pay a sum of money by a day certain & failed of procuring the money for that purpose till a week before hand and then fell sick. If one enters into a conditional agreement that if an other person pay by a certain day he will convey, otherwise the a=greement to be void & takes a note of hand; Chancery not=withstanding the agreement thus conditional will compel a conveyance whenever the note is collected.

16. When a controversy cannot be settled at law without a multiplicity of suits as in matters of account, concerning which, there has arisen a number of disputes Chan will take up the whole ~~controversy~~ controversy & make a final settlement.

The remedy at law is not deemed adequate in cases of

# Powers of Chancery

this kind since the expence of a number of suits would ruin the par=ties. The bill brought in Chancery in this case is called a bill of peace. A bill of peace has been brought ~~in our Court of Equity~~ to general assembly but new=er in our court of Superior Court.

+ 17. At Com. Law bonds are not negotiable yet chancery will protect the assignment. So in ~~Com where~~ Com. where where notes are not negotiable – Ld. Ry. 683. 2 Vern. ~~[illegible]~~ 540

+ 18 A court of chancery will decree the performance of an award, on the ground of an agreement to abide by it. This rule obtains to prevent litigation, tho' personal property be the subject in dispute – 3 P. W. 184. 2 Vern. 24.

+ 19. Where one of two partners dies, any action which would have lain against both had both ~~been~~ been living must be brought against the survivor – And if both partners be dead the executor of him who survived the other is liable; yet if the last partner died a bankrupt, Chancery will give a remedy against the Ex^tr. of him who died first – In Eng. appli=cation is always made to chancery in this case – Formerly in it was so in Law. But it has been lately been resolved by the superior court that an adequate remedy may be had at law. It is necess=ary ~~to~~ to state in the declaration, circumstances showing the propriety of commming upon the Ex^tr. of the partner who died first –

# Powers of Chancery—

1 In Eng. every bond creditor is considered as having a lien upon the land of which the debtor died seized. But if the debtor in his life time had attempted to convey, Chancery will not consider him as having died seized on the ground of the general maxim often repeated. 10 Mod 468. 4 Bro. P.C.7.

A question of great importance is whether in case of a loss after an agreement respecting the sale of the property the vendor or vendee shall lose it? If the maxim that whatever is agreed to be done is considered as done holds true in this case there can be no doubt as to the decision of Chan. in this case. There has however been a variety of opinions on the subject — Mr. Reeve however supposes that the loss must fall upon the vendee, otherwise the application of the general maxim would be uncertain 2 Vern. 280. 1 P.W. 261. 61. 1 Bro. Ch. 156. 2 P.W. 280. 2 Bro. Ch. 69. 76.

Analogous to this would be the decisions in a court of Law in certain cases. If A. agrees to sell a house to B. when B. should produce the money in payment, both engaging to perform, the property of the house is held in law to be transferred; this was settled first by a decision in 18 of Ed. 3.d which decision has never since been controverted. A distinction is to be taken between ~~those cases~~ this case and those cases where it is left optional with the parties whether to perform or not —

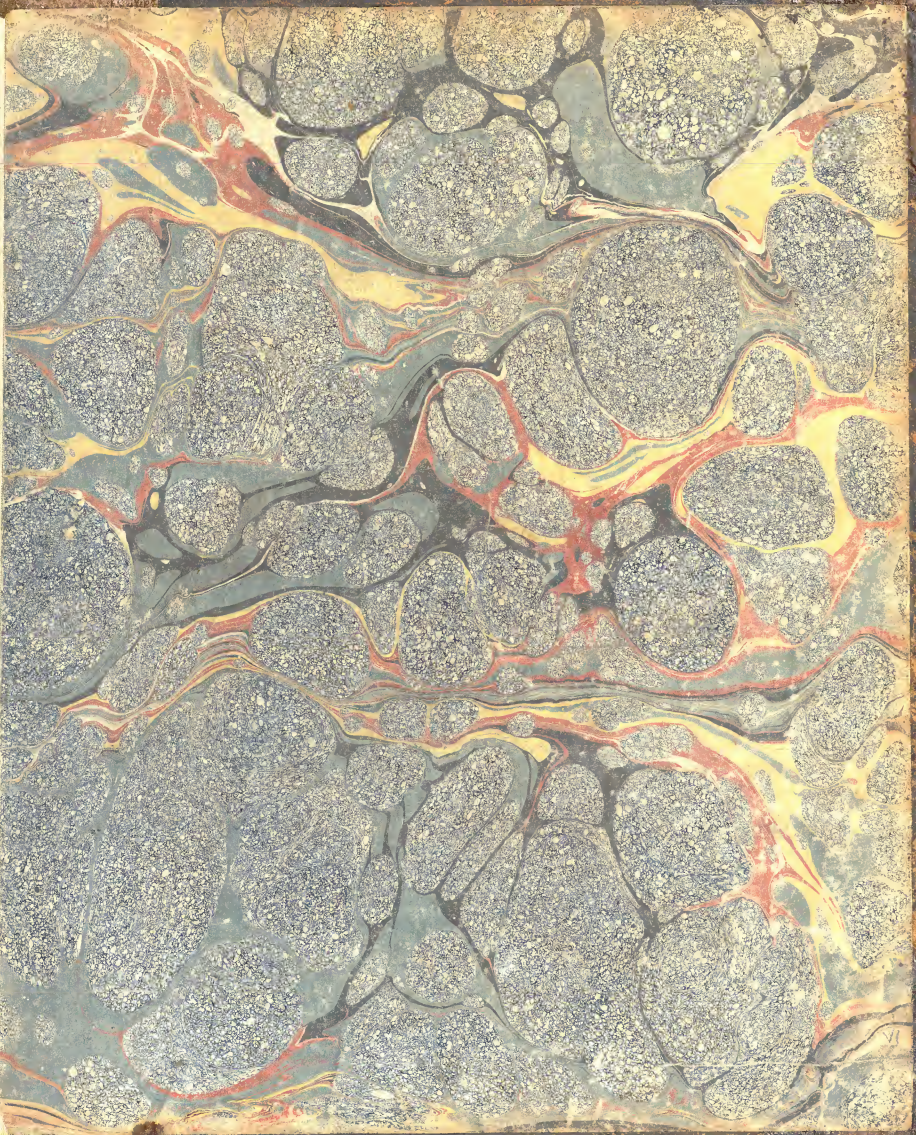
# Powers of Chancery

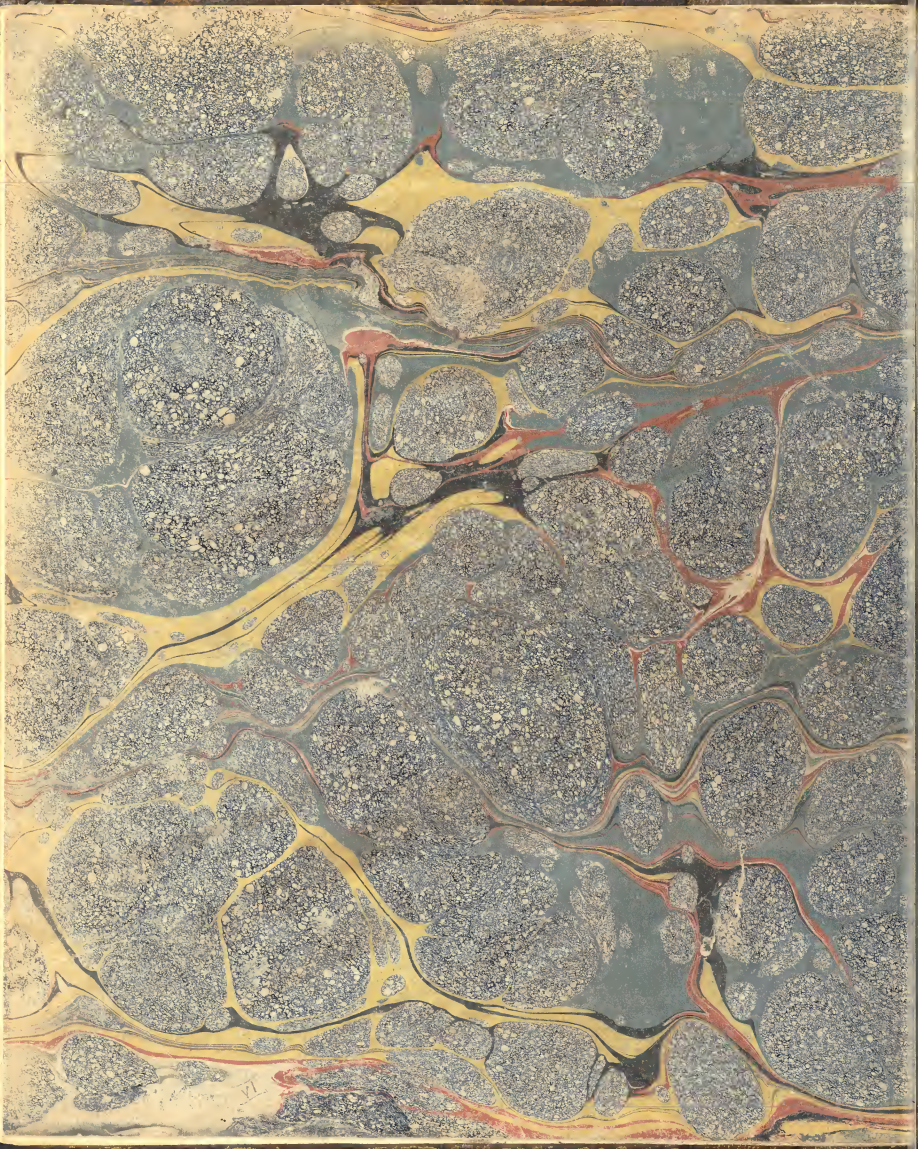
20. Chancery will order an offset when injustice would otherwise be done or when a person is sued by a bankrupt there being mutual debt and credit. In Lou. the remedy in this instance is in Chan. but in Eng. courts of law will order a set off, under the stat. 2 & 8 Geo. 2d. 3 Bl. 304 2 Wan Bl. 442. 4 T.R. 123. 6 T.R. 456.

21. It is a rule in equity that when one asks equity he must do equity & therefore when one asks a specific performance of a contract he must show that he has performed on his part. So strict is this rule that when it becomes impossible for one to perform by inevitable accident Chancery will not interfere. But if after part performance, a total performance becomes impossible for one to perform Chan. will interfere. If it becomes impossible to perform in toto but part performance is lawful Chancery will decree that the perform in part only. Ves. 87. 3 Brown's P.C. 339.

22. If there be a contract about land which at the time of making it, was good, and substantial doubts respecting the title afterwards arise, Chan. will have the decision at Law, yet if the title is probably good, chancery will decree since a decree of that court does not alter ~~that~~ the title. 2 P.W. 199. 2 Atk. 19. 20.

23. A vendor from the time of ~~taking~~ making the agreement is considered as a trustee to the vendee and vice versa, tho' the agreement wants some formalities; for whatever is agreed to be done is considered in Chancery as done. 3 P.W. 217. 1 Ve. 410.





REEVE'S
LECTURES

VI